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Oceans apart : the United States, the European Union, and the International Criminal Court

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THESIS

OCEANS APART: THE UNITED STATES, THE EUROPEAN UNION, AND THE INTERNATIONAL CRIMINAL COURT

by

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September 2003

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Both the United States and the European Union support the promotion of international justice yet disagree over the utility of the International Criminal Court. The controversy that the Court has generated among members of the long-standing trans-Atlantic partnership is indicative of deeper differences between the United States and EU members and it has the potential to threaten alliance cohesion. This thesis examines American policy toward the Court and its foundations, as well as the actions taken since the May 2002 withdrawal of the U.S. signature to the Rome Statute establishing the ICC. It then reviews EU policies toward the Court and their foundations, focusing on reactions to American policies and to the controversy associated with U.S. actions since the May 2002 withdrawal. The thesis analyzes the dispute between the United States and the EU over the ICC, focusing on the disparity in power, the roles of sovereignty and the UN Security Council, disagreements over means of achieving agreed ends in international law, the dispute's politicized nature, and the degree to which both sides seem to be "talking past one another." Finally, the thesis evaluates scenarios for the Court's development and their potential effects on European-American relations, and offers recommendations.

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OCEANS APART: THE UNITED STATES, THE EUROPEAN UNION, AND THE INTERNATIONAL CRIMINAL COURT

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ABSTRACT

Both the United States and the European Union support the promotion of international justice yet disagree over the utility of the International Criminal Court. The controversy that the Court has generated among members of the long-standing trans-Atlantic partnership is indicative of deeper differences between the United States and EU members and it has the potential to threaten alliance cohesion. This thesis examines American policy toward the Court and its foundations, as well as the actions taken since the May 2002 withdrawal of the U.S. signature to the Rome Statute establishing the ICC. It then reviews EU policies toward the Court and their foundations, focusing on reactions to American policies and to the controversy associated with U.S. actions since the May 2002 withdrawal. The thesis analyzes the dispute between the United States and the EU over the ICC, focusing on the disparity in power, the roles of sovereignty and the UN Security Council, disagreements over means of achieving agreed ends in international law, the dispute's politicized nature, and the degree to which both sides seem to be "talking past one another." Finally, the thesis evaluates scenarios for the Court's development and their potential effects on European-American relations, and offers recommendations.

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Thanks also to my family and friends in the local area for support during my studies at the Naval Post Graduate School.

Any mistakes are my own.

DEDICATION

For my grandmother
Elsie Dyer Monaco
1908-2003

Pilot, loving wife, devoted mother,
The world's best grandmother

Thank you for your service

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I- INTRODUCTION

This thesis addresses competing American and European Union perceptions and policies toward the International Criminal Court. It examines the foundations of American and European views, analyzes what the differences in these views indicate about the current status of European-American relations, and evaluates the implications of diverging opinion for the future of the Euro-Atlantic relationship.

The International Criminal Court, and the controversy it has raised between the United States and its European Union partners, is an important issue with ramifications for the future of international law and Euro-Atlantic partnership. As the European Union expands its membership and gains increased supranational legal, political, and economic responsibilities, the split in European and American views could increase the likelihood of European-American divisions on critical foreign policy matters. Additionally, the diverging views on each side of the Atlantic could make multi-lateral consensus for military and humanitarian intervention more difficult to obtain. When the ICC hears its first case against an indicted criminal, the outcome may have significant implications, whether positive or negative, for both the Court's supporters and detractors. In addition to political ramifications, the Court's first case will set important precedents in international law and may call into question the practice of establishing ad hoc criminal tribunals for those accused of war crimes and crimes against humanity. In short, the International Criminal Court, given the strong views it has elicited on both sides of the Atlantic, symbolizes a growing rift in trans-Atlantic relations that will challenge European and American leaders alike.

A. MAJOR RESEARCH QUESTIONS

This thesis seeks to answer the following major research question: What does the controversy between the United States and European Union governments over the International Criminal Court indicate about the respective strategic cultures of each side and the future of the transatlantic relationship? In order to answer this question and evaluate why the policies of the United States and European Union governments have

caused such controversy, this thesis also investigates these subsidiary questions: What are the policies of the United States and the European Union toward the Court and what are their respective foundations? What are the merits of American reservations about the Court and European responses to them, and how has this dispute developed? What are the likely implications of this dispute for the future of the International Criminal Court and the transatlantic relationship? Finally, what can be done by both sides to alleviate tensions and resolve contentious issues between them?

In investigating these research questions, this thesis makes the following preliminary observations. It appears that the United States and the European Union agree on the principles embodied by the Rome Statute but disagree on the Court itself due to diverging strategic cultures and national traditions. Furthermore, official U.S. opposition to the Court evidently stems from American constitutional and legal traditions, whereas support for the Court among members of the European Union is a product of Europe's unique tradition of transnational legal and political institutions. The thesis investigates the hypothesis that the ICC has become a symbolic and politicized issue used for political leverage by both sides, and that both agree on the ends sought in international law but differ on the appropriate means of achieving them. The thesis assesses the risk that the controversy over the ICC and lack of American involvement could threaten the Court in its early stages or damage a currently fragile Euro-Atlantic partnership.

This thesis examines the official policies of the United States and European Union governments and their foundations in domestic policies and international legal traditions. It initially addresses U.S. perceptions of the Court. It analyzes the specific American reservations about the Court and stated reasons for the withdrawal of signatory status on 6 May 2002[1]. The U.S. policy on the Court can be traced to American legal and constitutional traditions. The thesis then focuses on European perceptions of the ICC. The strong European support for the Court has its foundations in the emerging tradition of the European Union's trans-national legal and governmental institutions.

The next element of the thesis consists of an analysis of what the differences in views of the Court indicate about the current status of trans-Atlantic relations. It

[1] "United States of America." [http://www.iccnow.org/countryinfo/theamericas/unitedstates.html]. Accessed 16 December 2002.

evaluates the extent to which these differing interpretations signify divergent European and American views and increase the likelihood of future diplomatic and political disagreements in trans-Atlantic relations. This section of the thesis examines the political and symbolic nature of the dispute over the Court, and the resulting characterization of American and European policies as unilateralist and multilateralist, respectively. The thesis then addresses the implications of this disagreement for the future of transatlantic relations and European and American responses to international events and crises. This section discusses the importance of the growing rift between America and Europe in the context of the debate over military intervention in and reconstruction of Iraq and continuing peacekeeping commitments in the Balkans, and with regard to future multilateral military and humanitarian interventions. The thesis concludes with the recommendation that United States policymakers evaluate the political and diplomatic costs of America's withdrawal of its signature to the treaty establishing the Court in light of the current divergence in opinion between the United States and Europe and weigh the benefits of adhering to the Rome Statute.

B. METHODOLOGY AND SOURCES

The controversy surrounding the International Criminal Court can be analyzed and interpreted by various methods. The first interpretation emphasizes elements of international law and the cultural, legal, and political backgrounds from which one views the nascent Court. This perspective focuses on whether the Court, as constituted in the 1998 Rome Statute, can be a viable legal institution for prosecution of the world's worst crimes. However, a strict reading of the text of the Rome treaty alone is insufficient to evaluate the Court's potential effectiveness and implications. The cultural, legal, and political backgrounds from which one views the Court are instrumental in understanding a government's policies toward the ICC.

Furthermore, this dispute can be interpreted not only as a disagreement over the specific provisions of the Court but also as a more general disagreement about the effectiveness and reliability of legal institutions with broad jurisdiction and wide-ranging powers. The latter, broader disagreement amounts to a dispute over the advisability of states transferring legal and political sovereignty to international institutions and regimes.

The essence of this disagreement is visible in the debates within American society between those who view the subordination of national sovereignty to the International Criminal Court in certain instances as critical to upholding the tenets of international law and those who fear that any subordination of American sovereignty to the Court will damage American foreign policy and endanger American citizens.

An additional interpretation of the Court presents it as a symbolic issue or a "political football" tossed back and forth between its supporters and detractors. In this manner, the Court is often viewed as one in a long list of disputed international treaties and agreements, such as the Kyoto Protocol to the United Nations Framework Convention on Climate Change[2] or the Ottawa Landmine Treaty (Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti Personnel Mines and on Their Destruction).[3] Consequently, general conclusions about a particular state's policies regarding international law and supranational institutions have been drawn based on that state's acceptance or rejection of the Court. The United States and the European Union have also used the Court as a means of pressuring aspirant members of NATO and the European Union to either reject the Court, in the case of the United States and NATO membership, or support the Court, in the case of the European Union and EU membership.[4]

This thesis combines elements of these interpretations, examining the legal arguments for and against the Court, investigating the foundations of European and American perceptions, and evaluating the extent to which the Court has become a politicized issue and what impact this development may have on future trans-Atlantic relations.

It relies heavily on official United States and European Union government sources for documents, legislation, and proclamations. It investigates available material from international non-governmental organizations involved with the Court and

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2 "The Kyoto protocol- A brief summary." [http://europa.eu.int/comm/environment/climat/kyoto.htm]. Accessed 11 March 2003.

3 "Arms Control Today- The Ottawa Landmine Treaty: Analysis and Text." [http://www.armscontrol.org/act/1997_09/apltreat.asp]. Accessed 7 February 2003.

4 "The International Criminal Court: Choose your club, America says: Central Europe torn between the EU and the United States," *The Economist*, 24 August, 2002, 42.- This article discusses how the ICC is being used as a means of pressuring aspirant members of international organizations.

international law. The thesis also evaluates general sources on U.S., European, and U.S.-European policy matters as well as the theoretical and historical foundations of current policies of both sides.

C. ORGANIZATION

Chapter II addresses the United States position on the ICC. It outlines the specific American reservations about the role of the ICC's prosecutor, protections for American service members, and the Court's intended universal jurisdiction. This chapter also investigates the foundations of United States policy in American constitutional and legal tradition. This section is fundamental to the analysis of the thesis as it provides a foundation for explaining the disputes between the United States and the European Union and the controversy caused by the Court.

Chapter III addresses the European Union position on the ICC. It examines the strong support in Europe for the Court, the sources thereof in the historical European adherence to multilateral international treaties, and case studies of British, French and German policies on the Court. Additionally, it investigates the emerging constitutional framework in the European Union and existing international legal structures in the EU with respect to support for the ICC. This chapter is critical to the analysis because it outlines how the European Union's policy toward the Court differs from that of the United States, thus introducing the foundations of controversy over the Court.

Chapter IV examines the divergence in European and American views of the Court. This chapter focuses on the nature of the dispute between the two sides and how the issue of the ICC has assumed meaning beyond that of an international legal institution for both sides. It examines the symbolic nature of the ICC and the resulting characterization of American policies as unilateralist and European policies as multilateralist, as well as the degree to which the Court has become a politicized issue and has been used as a political "weapon" in negotiations with European countries aspiring to join the European Union and NATO. This section is critical to the thesis because it outlines why the Court has assumed an important role in U.S.-European relations and why, due to the nature of the dispute between the United States and the

European Union, this controversy could have lasting implications for the success of the ICC as well as transatlantic relations.

Chapter V examines the implications of the current controversy for the ICC and transatlantic relations in the future. This chapter evaluates how the controversy might influence the ICC in its early stages of development as well as how it might interact with existing and future ad hoc war crimes tribunals. In addition, it examines the impact of the current controversy on the future of U.S.-European relations within the context of the diplomatic repercussions of the military intervention in Iraq and in an era of increasing international military and humanitarian commitments. This chapter is important because it sets the stage for the recommendations that are provided with a view to ensuring that the current controversy does not significantly de-stabilize U.S.-European relations.

The concluding chapter of the thesis reviews the major areas of analysis and arguments presented in the preceding chapters, including findings about the nature of the dispute over the ICC and provides recommendations. This chapter is designed not only to synthesize the conclusions readied in the thesis, but also to provide recommendations for future policy and to stimulate interest in further research regarding the Court and its significance for transatlantic relations.

II- THE U.S. POSITION ON THE ICC: ANALYSIS AND EVALUATION

A. U.S. POLICY TOWARD THE ICC

The United States played a leading role in the conception and establishment of many norms of international justice after the Second World War. A leading proponent of the International Military Tribunals at Nuremberg and Tokyo, the United States was also instrumental in writing the United Nations Charter, the Universal Declaration of Human Rights,[5] the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,[6] the United Nations Security Council resolutions establishing the International Criminal Tribunals for the former Yugoslavia and Rwanda,[7] and the 1998 Rome Statute of the International Criminal Court.[8] These efforts, though varying in successful operation and even support from the United States following their creation, nonetheless reflect a desire to protect human rights, deter atrocities and crimes against humanity, and punish their perpetrators. The terrible atrocities of the 1990s in the former Yugoslavia and Rwanda galvanized international support for ad hoc war crimes tribunals for both, and helped to gain support for the evolving concept of a permanent international criminal court. The United States played an influential role in supporting the concept of such a court,[9] and in December 2000 President Clinton signed the resulting 1998 Rome Statute, albeit with reservations. In President Clinton's words:

> In signing, however, we are not abandoning our concerns about significant flaws in the treaty. In particular, we are concerned that when the court comes into existence, it will not only exercise authority over personnel of states that have ratified the treaty, but also claim jurisdiction over

5 Brian Urquhart, "Mrs. Roosevelt's Revolution," *The New York Review of Books* (26 April 2001).

6 Samantha Power, *A Problem from Hell: America and the Age of Genocide* (New York: Basic Books, 2002), 62-63.

7 Kenneth Roth, "The Court the U.S. Doesn't Want," *The New York Review of Books* (19 November 1998): 45.

8 The founding role of the United States in these institutions should not be discounted, although its support for them has in practice been uneven. The United States participated in the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court that produced the Rome Statute of the International Criminal Court adopted on 17 July 1998 in Rome.

9 John R. Bolton, "Courting Danger: What's Wrong With the International Criminal Court," *The National Interest* (Winter 1998/99): 61.

> personnel of states that have not. With signature, however, we will be in a position to influence the evolution of the court. Without signature, we will not. Signature will enhance our ability to further protect US officials from unfounded charges and to achieve the human rights and accountability objectives of the ICC. I will not, and do not recommend that my successor submit the treaty to the Senate for advice and consent until our fundamental concerns are satisfied.[10]

The reservations of President Clinton and other U.S. government and military leaders played a critical role in the development of America's policy toward the ICC.

The United States formally withdrew its signature from the 1998 Rome Statute on the International Criminal Court, having never ratified it, because of perceived shortcomings of the proposed Court. In May 2002 U.S. Under Secretary of State for Arms Control and International Security John R. Bolton wrote as follows to U.N. Secretary General Kofi Annan:

> This is to inform you, in connection with the Rome Statue of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty.[11]

The current American policy toward the Court was succinctly stated in the September 2002 National Security Strategy:

> We will take actions necessary to ensure that our efforts to meet our global security commitments and protect Americans are not impaired by the potential for investigations, inquiry, or prosecution by the International Criminal Court (ICC), whose jurisdiction does not extend to Americans and which we do not accept…We will implement fully the American

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10 "Statement by US President Bill Clinton, authorizing the US signing of the Rome Statute of the International Criminal Court: 31 December 2000: Camp David, Maryland, United States." [http://www/iccnow.org/resourcestools/statements/governments/USClintonSigning21Dec00.doc]. Accessed 16 December 2002.

11 "U.S. Department of State: Press Statement: Richard Boucher, Spokesman- Washington, DC- May 6, 2002- International Criminal Court: Letter to UN Secretary General Kofi Annan." [http://www.state.gove/r/pa/prs/2002/9968.htm]. Accessed 14 May 2003.

> Servicemembers Protection Act, whose provisions are intended to ensure and enhance the protection of U.S. personnel and officials.[12]

Though the United States supported the general aims of the Court, it withdrew its signature from the Rome Statute due to various reservations, including the potential abuse of the prosecutor's powers and the Court's high level of autonomy from the UN Security Council.

B. OBJECTIONS THAT PRECIPITATED WITHDRAWAL

Primary American concerns included immunity for United States peacekeepers and soldiers from prosecution,[13] the role of the independent prosecutor, and fears of the Court being used in politically-motivated circumstances against American personnel or high-ranking officials. The United States also expressed concern about the ICC's intended universal jurisdiction and the risk that it would usurp the authority of the United Nations Security Council.

Of critical concern was the risk that the ICC would be used to prosecute American soldiers for actions committed during United Nations peacekeeping operations. In a speech in September 2002 John R. Bolton, Under Secretary of State for Arms Control and International Security, outlined President Bush's position on the ICC vis-à-vis American peacekeepers:

> As President Bush said, "The United States cooperates with many other nations to keep the peace, but we will not submit American troops to prosecutors and judges whose jurisdiction we do not accept… Every person who serves under the American flag will answer to his or her own superiors and to military law, not to the rulings of an unaccountable International Criminal Court."[14]

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12 *The National Security Strategy of the United States of America* (Washington, D.C.: The White House, September 2002), p. 31.

13 Samantha Power, *A Problem From Hell: America and the Age of Genocide* (New York: Basic Books, 2002), 491: "…the United States opposed the creation of the ICC on the grounds that rogue prosecutors would use it to harass U.S. soldiers."

14 "The United States and the International Criminal Court: John R. Bolton, Under Secretary for Arms Control and International Security: Remarks at the Aspen Institute- Berlin, Germany- September 16, 2002." [http://www.iccnow.org/resourcestools/statements/governments/USBolton_Aspen16Sept02.doc]. Accessed 16 December 2002.

The United States has taken active measures, which are examined later in this chapter, to ensure that its soldiers are protected from the Court's jurisdiction.

Another key American concern has been the role of the independent prosecutor, who will have wide-ranging authority that the United States fears will be unlimited and unsupervised. The United States objects to the power of the prosecutor as articulated in Article 42(1) of the Rome Statute:

> The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.[15]

In remarks in September 2002 John R. Bolton, Under Secretary of State for Arms Control and International Security, discussed American concerns about the prosecutor:

> We are considering, in the Prosecutor, a powerful and necessary element of executive power, the power of law-enforcement. Never before has the United States been asked to place any of that power outside the complete control of our national government without our consent…In the ICC's central structures, the Court and Prosecutor, these sorts of political checks [i.e., checks and balances as in the separation of powers in the U.S. system of government specified in the Constitution] are either greatly attenuated or entirely absent. They are effectively accountable to no one. The Prosecutor will answer to no superior executive power, elected or unelected.[16]

Bolton continued his comments on the ICC's prosecutor: "Unfortunately, the United States has had considerable experience in the past two decades with domestic 'independent counsels,' and that history argues overwhelmingly against international repetition. Simply launching massive criminal investigations has an enormous political impact."[17]

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15 "Rome Statute of the International Criminal Court." [http://www.iccnow.org/html/icc19990712.html]. Accessed 16 October 2000.

16 "The United States and the International Criminal Court: John R. Bolton, Under Secretary for Arms Control and International Security: Remarks at the Aspen Institute- Berlin, Germany- September 16, 2002." [http://www.iccnow.org/resourcestools/statements/governments/USBolton_Aspen16Sept02.doc]. Accessed 16 December 2002.

17 Ibid.

The United States also fears that the ICC would be used against its citizens primarily for political purposes, or that it would bring a senior American official to trial. John Bolton addressed this fear in a speech in September 2002:

> A fair reading of the treaty leaves one unable to answer with confidence whether the United States would now be accused of war crimes for legitimate but controversial uses of force to protect world peace. No U.S. President or his advisors could be assured that he or she would be unequivocally safe from the charges of criminal liability.[18]

This concern stems from Article 27(1) of the Rome Statute, which reads in part: "This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government of parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute."[19]

Perhaps the most threatening aspect of the Court, however, is its claim of universal jurisdiction whenever national judicial bodies fail to act. Proponents of the Court have been unsuccessful in persuading the United States of the safeguards that would limit the scope of the ICC's jurisdiction. David J. Scheffer, then Ambassador at Large for War Crimes Issues and Head of the U.S. Delegation to the U.N. Diplomatic Conference on the Establishment of a Permanent International Criminal Court**,** told the Committee on Foreign Relations of the U.S. Senate in July 1998:

> Thus, the treaty purports to establish an arrangement whereby U.S. armed forces operating overseas could be conceivably prosecuted by the international court even if the United States has not agreed to be bound by the treaty…Our position is clear: Official actions of a non-party state should not be subject to the court's jurisdiction if that country does not join the treaty, except by means of Security Council action under the U.N. Charter. Otherwise, the ratification procedure would be meaningless for governments. In fact, under such a theory, two governments could join

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18 "The United States and the International Criminal Court: John R. Bolton, Under Secretary for Arms Control and International Security: Remarks at the Aspen Institute- Berlin, Germany- September 16, 2002." [http://www.iccnow.org/resourcestools/statements/governments/USBolton_Aspen16Sept02.doc]. Accessed 16 December 2002.

19 "Rome Statute of the International Criminal Court." [http://www.iccnow.org/html/icc19990712.html]. Accessed 16 October 2000.

> together to create a criminal court and purport to extend its jurisdiction over everyone, everywhere in the world.[20]

Though the ICC has sought universal jurisdiction to prevent the world's worst criminals from escaping justice by asserting that it lacks jurisdiction, the United States contends that extending the Court's jurisdiction in this manner threatens the integrity of the international treaty-making process. The Rome Statute holds that citizens of states that do not consent to be bound by this treaty can still come under its purview.

A related U.S. concern is that the ICC would undermine the authority of the United Nations Security Council. As John Bolton has noted, "Under the UN Charter, the Security Council has primary responsibility for the maintenance of international peace and security. The ICC's efforts could easily conflict with the Council's work…In requiring an affirmative Council vote to stop a case, the Statute shifts the balance of authority from the Council to the ICC."[21] This concern refers to Article 16 of the Rome Statute: "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions."[22] In other words, any of the five permanent members of the United Nations Security Council could prevent adoption of such a resolution and thereby ensure the conduct of an investigation or prosecution by the ICC.

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20 "Statement of David J. Scheffer: Ambassador-at-Large for War Crimes Issues And Head of the U.S. Delegation to the U.N. Diplomatic Conference on the Establishment of a Permanent International Criminal Court: Before the Committee on Foreign Relations of the U.S. Senate, July 23, 1998." [http://www.iccnow.org/resourcestools/statements/governments/USScheffer_Senate23July98.doc]. Accessed 16 December, 2002.

21 "The United States and the International Criminal Court: John R. Bolton, Under Secretary for Arms Control and International Security: Remarks at the Aspen Institute- Berlin, Germany- September 16, 2002." [http://www.iccnow.org/resourcestools/statements/governments/USBolton_Aspen16Sept02.doc]. Accessed 16 December 2002.

22 "Rome Statute of the International Criminal Court." [http://www.iccnow.org/html/icc19990712.html]. Accessed 16 October 2000.

C. FOUNDATIONS OF AMERICAN OBJECTIONS

Thus, the withdrawal of the U.S. signature represents more than a simple rejection of the Court.[23] Despite official statements that the United States is "not seeking to weaken the ICC,"[24] U.S. actions suggest that Washington intends to actively oppose its capability to affect U.S. options. These specific grievances are consistent with broader concerns about how the Court could negatively affect the U.S. governmental and legal system. The Court is considered by some U.S. experts to threaten fundamental principles governing American society,[25] including the clear delineation of powers among government branches, the accountability of each through representative elections, and a system of checks and balances. Though supporters of the ICC claim that its prosecutor and judges will be "beyond reproach,"[26] the system established by the Rome Statute has raised fears that officers of the Court not operating within guidelines as strict as the U.S. Constitution will threaten fundamental rights. Cornell University's Jeremy Rabkin, in an article entitled "International Law vs. the American Constitution: Something's Got to Give," captured the essence of American fears:

> But then what do the guarantees in the Bill of Rights mean if they can be side-stepped any time our government finds it more convenient to have Americans tried by foreign authorities? We would then have a Constitution that can be amended without the bother of persuading three-quarters of the states to adopt a formal amendment.[27]

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23 The degree to which the Bush administration has opposed the ICC seems clear: "Sources report that the Bush administration is wary of setting any precedent of senior US officials testifying before international courts, particularly with regard to the International Criminal Court." "United States of America." [http://www.iccnow.org/countryinfo/theamericas/unitedstates.html]. Accessed 16 December 2002.

24 "Statement by Philip T. Reeker, Deputy Spokesman of the US State Department: U.S. and Romania Sign Article 98 Agreement: August 1, 2002." [http://www.iccnow.org/resourcestools/statements/governments/USReekerArt98Romania1Auf02.doc]. Accessed 10 March 2003. – Please see Mr. Reeker's comments regarding Article 98 agreements below in this chapter.

25 According to *The Economist*, "The political arguments are, in essence, that a strong democracy resents having its hands tied by international agreements, for doing so limits the rights of domestic voters and institutions to set their own rules." ("Present at the Creation: A Survey of America's World Role," *The Economist*, 29 June 2002, 25.)

26 "The ICC Treaty establishes strict criteria for the selection of the prosecutor and the judges, requiring experts whose reputation, moral character and independence are beyond reproach." : (Human Rights Watch: "Myths and Facts About the International Criminal Court." [http://www.hrw.org/campaigns/icc/facts.htm]. Accessed 22 October 2002.)

27 Jeremy Rabkin, "International Law vs. the American Constitution: Something's Got to Give," *The National Interest* (Spring 1999): 35.

American fears about the power of the International Criminal Court are not totally unfounded, and appear quite reasonable given the unique Constitutional developments in the United States and the prevailing American perspective on international institutions.

The U.S. objections to the ICC are grounded in principles embodied in the United States Constitution and American legal tradition. An excellent summary of the constitutional and legal foundations of U.S. skepticism about the ICC is presented in "Sec 2. Findings" of H.R. 4169 on 11 April 2002:

> (11)The Statute of the International Criminal Court also contravenes the principles of separation of powers, federalism, and trial by jury that are guaranteed by the Constitution of the United States, because the International Criminal Court has been endowed with legislative, executive, and judicial powers and with criminal jurisdiction without regard to the jurisdiction of the United States and the several States. (12)The International Criminal Court, by design and effect, is an illegitimate court, established contrary to the provisions of the Charter of the United Nations, the American Declaration of Independence, and the Constitution of the United States, and as such, puts United States citizens in jeopardy of unlawful and unconstitutional criminal prosecution, with members of the United States Armed Forces placed especially at risk of politically motivated arrests, prosecutions, fines, and imprisonments for acts engaged in for the protection of the sovereignty and independence of the United States.[28]

Under Secretary of State for Political Affairs Marc Grossman reaffirmed in May 2002 that U.S. policy toward the ICC is based on American values:

> We believe that states, not international institutions are primarily responsible for ensuring justice in the international system. We believe that the best way to combat these serious offenses is to build domestic judicial systems, strengthen political will and promote human freedom…We believe that the ICC undermines the role of the United Nations Security Council in maintaining international peace and security. We believe in checks and balances. The Rome Statute creates a prosecutorial system that is an unchecked power. We believe that in order to be bound by a treaty, a state must be party to that treaty. The ICC asserts jurisdiction over citizens of states that have not ratified the treaty. This threatens US sovereignty. We believe that the ICC is built on a

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28 "American Servicemember and Citizen Protection Act of 2002 (Introduced in House)- 107th Congress, 2d Session, H.R. 4169: "To provide that the International Criminal Court is not valid with respect to the United States, and for other purposes": In the House of Representatives, April 11, 2002." [http://thomas.loc.gov/cgibin/query/C?c107:./temp/~c1071nr6G2]. Accessed 7 September 2003. These findings, part of H.R. 4169, were not included in the final version of the American Servicemembers' Protection Act.

> flawed foundation. These flaws leave it open for exploitation and politically motivated prosecutions.[29]

America's withdrawal of its signature to the Rome Statute is also consistent with its historical reluctance to ratify certain types of international treaties. *The Economist* discussed this phenomenon in its June 2002 survey of America's world role: "[I]t is a paradox: America has promoted worldwide standards for human rights, military behaviour and even environmental protection, and has reinforced them through foreign aid, economic sanctions, moral suasion and even military intervention; yet Congress has often balked at ratifying the treaties codifying such standards, taking years to do it, demanding reservations on the treaties that nullify much of their domestic effect, or even rejecting them altogether."[30] Andrew Moravcsik of Harvard discusses the reluctance of the United States to be bound by international human rights treaties despite its domestic and international commitment to human rights. Moravcsik notes:

> The United States has helped establish and enforce global human rights standards through rhetorical disapproval, foreign aid, sanctions, military intervention, and even multilateral negotiations. It does so even in some areas—most recently humanitarian intervention in Kosovo—where the costs are potentially high. At the same time, however, the United States remains extremely cautious about committing itself to the domestic application of binding international legal standards for human rights. In particular, it has been hesitant to ratify multilateral human rights treaties, despite their acceptance among nearly all advanced industrial democracies, many developing democracies, and, in many cases, nondemocratic governments. When the United States does ratify such treaties, it typically imposes so many reservations that ratification has no domestic effect.[31]

Moravcsik charts the length of time it took the United States Senate to give its advice and consent to the ratification of various major international human rights treaties, among them the Genocide Convention, the Torture Convention, and the Covenant on

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[29] "Marc Grossman, Under Secretary for Political Affairs, Remarks to the Center for Strategic and International Studies, Washington, DC, May 6, 2002." [http://www.iccnow.org/resourcestools/statements/governments/USUnsigningGrossman6May02.doc]. Accessed 10 March 2003.

[30] "Present at the Creation: A survey of America's world role," *The Economist*, 29 June 2002, 24.

[31] Andrew Moravcsik, "Why is U.S. Human Rights Policy So Unilateralist?" in Stewart Patrick and Shepard Forman, eds., *Multilateralism and U.S. Foreign Policy: Ambivalent Engagement* (Boulder, Colorado: Lynne Rienner Publishers, 2002), 345.

Civil and Political Rights.[32] The United States position toward the Court embodies America's unique view of its world role, including its belief in the primacy of domestic legal and political systems, and is based on its unparalleled power and influence in international affairs. Predictably, this position has fomented consternation among America's closest allies in Europe.

D. AMERICA'S ICC POLICY SINCE MAY 2002

United States policy toward the International Criminal Court has caused diplomatic and political controversy for the United States and its closest allies, particularly those in Europe. U.S. withdrawal from the Rome Statute in May 2002 caused frustration among European supporters of the Court, and U.S. policies since the withdrawal have provoked further criticism. European and American policies on the Court have clashed in three specific areas: the diplomatic dispute over United Nations Security Council resolutions sought by the United States in 2002 and 2003 exempting U.S. peacekeeping troops from ICC jurisdiction, America's attempts to secure immunity for its personnel under so-called "Article 98 agreements," and passage of the American Servicemembers' Protection Act of 2002. Each measure highlights the United States concern about the protection of U.S. citizens, one of the fundamental tasks of any sovereign government.

1. United Nations Peacekeeping Operations

On 30 June 2002, the United States vetoed the extension of the mandate for the United Nations peacekeeping mission in Bosnia-Herzegovina (UNMIBH), fearing that its personnel would be subject to the ICC's jurisdiction.[33] On 10 July 2002, in a statement

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[32] Andrew Moravcsik, "Why is U.S. Human Rights Policy So Unilateralist?" in Stewart Patrick and Shepard Forman, eds., *Multilateralism and U.S. Foreign Policy: Ambivalent Engagement* (Boulder, Colorado: Lynne Rienner Publishers, 2002), 357.

[33] "The American Non-Governmental Organizations Coalition for the International Criminal Court: AMICC: Chronology of the U.S. Opposition to the International Criminal Court: From 'Unsigning' to Immunity Agreements." [http://www.iccnow.org/pressroom/factsheets/FS-AMICC-PostNullification.doc]. Accessed 10 March 2003.

to the U.N. Security Council, Ambassador John D. Negroponte, the United States Permanent Representative to the United Nations, asserted that

> Peacekeeping is one of the hardest jobs in the world…Peacekeepers from states that are not party to the Rome Statute should not face, in addition to the dangers and hardships of deployment, additional, unnecessary legal jeopardy…Some have suggested that the United States is taking too alarmist a view of the dangers that the ICC poses to troop contributors. I would argue that supporters of the ICC take too alarmist a view of the pragmatic solution that the U.S. is proposing.[34]

The "pragmatic solution" proposed by the United States was to grant American troops serving as U.N. peacekeepers immunity from the ICC's jurisdiction as a condition of their participation in U.N.-sponsored operations. Thus, under diplomatic pressure from the United States, on 12 July 2002 the United Nations Security Council adopted Resolution 1422, which reads in part: "*Requests*, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise."[35]

This one year exemption from the Court's jurisdiction was up for review again in June 2003, when the U.N. Security Council approved resolution 1487 (2003), extending the exemption for an additional twelve-month period. The text of the new resolution, nearly identical to that of 1422 (2002), reads in part: "*Requests,* consistent with the provisions of Article 16 of the Rome Statute, that the ICC…shall for a 12-month period starting 1 July 2003 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise."[36] An important provision of

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34 "Statement by Ambassador John D. Negroponte, United States Permanent Representative to the United Nations, on the Situation in Bosnia and Herzegovina, Security Council, July 10, 2002." [http://www.iccnow.org/resourcestools/statements/governments/UnitedStatesSCDeb10July02.doc]. Accessed 10 March 2003.

35 "United Nations Security Council: Resolution 1422 (2002): Adopted by the Security Council at its 4572nd meeting, on 12 July 2002." [http://odsddsny.un.org/doc/UNDOC/GEN/N02/477/61/PDF/N0247761.pdf?OpenElement]. Accessed 11 March 2003.

36 "United Nations Security Council: Resolution 1487 (2003): Adopted by the Security Council at its 4772nd meeting, on 12 June 2003."

this resolution that may be cause for concern for ICC supporters is the subsequent reiteration of its "intention to renew the request…under the same conditions each 1 July for further 12-month periods for as long as may be necessary."[37]

U.N. Secretary General Kofi Annan expressed concern about this measure on 12 June 2003:

> But allow me to express the hope that this does not become an annual routine. If it did, I fear the world would interpret it as meaning that the Council wished to claim absolute and permanent immunity for people serving in the operations it establishes or authorizes. If that were to happen, it would undermine not only the authority of the ICC but also the authority of the Council and the legitimacy of United Nations peacekeeping.[38]

U.S. Ambassador James Cunningham, Deputy United States Representative to the United Nations, made the following remarks concerning the resolution at a 12 June 2003 meeting of the Security Council:

> It balances divergent positions and helps to ensure against undermining of United Nations peace operations. Like resolution 1422 (2002), resolution 1487 (2003) exempts States that are not parties to the Rome Statute but that participate in United Nations operations from the ICC's jurisdiction in a manner consistent with the Charter of the United Nations and with the 1998 Rome Statute. The resolution is consistent with a fundamental principle of international law: the need for a State to consent if it is to be bound.[39]

U.S. reluctance to support peacekeeping missions absent clear protection from ICC jurisdiction, particularly the critical UNMIBH mission in Europe, and the annual re-examination of exemptions for personnel of states not party to the Rome Statute could undermine U.S. relations with security partners in Europe.

[http://www.iccnow.org/documents/otherissues/1422/SCRes1487June2003eng.pdf]. Accessed 28 July 2003.

37 Ibid.

38 "United Nations Security Council, Fifty-eighth year, 4772nd meeting- Thursday, 12 June 2003, New York."
[http://www.icccnow.org/documents/otherissues/1422/UNSCpv1422debate12June03.pdf]. Accessed 28 July 2003.

39 Ibid.

2. Article 98 "Immunity Agreements"

From the perspective of the United States government, however, it is the reluctance of many European governments to grant exemptions for American personnel that could damage relations. Conversely, European champions of the ICC hold that the dispute over the UN peacekeeping mandate stems from America's requests for immunity for its citizens, officials, and personnel under so-called "Article 98" agreements. Such agreements have generated considerable frustration as opponents of U.S. efforts argue that the United States is fundamentally misinterpreting Article 98 of the Rome Statute. Article 98 (2) states that

> The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.[40]

Based on its interpretation of Article 98, the United States has attempted to secure bilateral agreements with its allies that "would require states to send an American national requested by the ICC back to the U.S. instead of surrendering him/her to the ICC."[41] According to ICC Now, a non-governmental organization, the July 2002 "Proposed Text of so-called Article 98 Agreements with the United States" reads as follows:

> 3. When the United States extradites, surrenders, or otherwise transfers a person of the other Party to a third country, the United States will not agree to the surrender or transfer of that person to the International Criminal Court by the third country, absent the expressed consent of the Government of X.
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> 4. When the Government of X extradites, surrenders, or otherwise transfers a person of the United States of America to a third country, the Government of X will not agree to surrender or transfer of that person to the International Criminal Court by a third country, absent the expressed consent of the Government of the United States.[42]

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40 "Rome Statute of the International Criminal Court." [http://www.iccnow.org/html/icc19990712.html]. Accessed 16 October 2000.

41 Human Rights Watch – "Bilateral Immunity Agreements: A Background Briefing, March 2003." [http://www.hrw.org/campaigns/icc/docs/bilateralagreements.pdf]. Accessed 7 March 2003.

42 "Proposed Text of so-called Article 98 Agreements with the United States- July 2002."

Despite U.S. efforts, ICC advocates such as Human Rights Watch, an international non-governmental organization, have taken a forceful stance of their own against U.S. Article 98 agreements. Kenneth Roth, executive director of Human Rights Watch, stated that

> Article 98 recognizes agreements among ICC member states to resolve competing claims to prosecute a suspect…But if agreements under Article 98 are to remain true to the purpose of the Rome treaty, they must respect the ICC's right to intervene in national prosecutions should they prove to be a charade…The entire point of the ICC was never to trust unverified national pledges to bring the worst human rights criminals to justice.[43]

In its 11 March 2003 issue of the "ICC Update," the Coalition for the International Criminal Court, another non-governmental organization, criticized U.S. Article 98 agreements as being "contrary to international law and the Rome Statute" and argued that "States that sign these agreements would breach their obligations under the Rome Statute, the Vienna Convention on the Law of Treaties and possibly their own extradition laws."[44] This update also stated that "These states will also violate Article 18 of the Vienna Convention on the Law of Treaties, which obliges them to refrain from acts that would defeat the object and purpose of the Statute."[45] It might, however, be noted that the Vienna Convention also holds that a state must express consent to be bound by a treaty, and provides that "The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed."[46]

The United States has concluded "Article 98 agreements" with over fifty countries,[47] including Albania, Bosnia-Herzegovina, and Romania. On 1 August 2002,

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[http://www.iccnow.org/documents/otherissues/impunityart98/USArticle98Agreement1Aug02.doc]. Accessed 6 August 2003.

43 Roth, Kenneth. "Resist Washington's arm-twisting." *The International Herald Tribune*, 30 September 2002. Available from [http://hrw.org/editorials/2002/icc0930.htm]. Accessed 28 February 2003.

44 "March 11th 2003 Special Edition: ICC Update." [http://www.iccnow.org/publications/update/iccupdate33Eng.pdf]. Accessed 14 March 2003.

45 Ibid.

46 "International Law Commission: Vienna Convention on the Law of Treaties." [http://www.un.org/law/ilc/texts/treaties.htm:]. Accessed 20 June 2003.

47 Fifty-three countries have signed Article 98 agreements with the United States as of 7 August, 2003. "Signatories of US Impunity Agreements (so-called Article 98 agreements), Last Updated: August 7,

the Deputy Spokesman of the U.S. State Department, Philip T. Reeker, commented on the U.S.-Romanian agreement:

> These agreements are consistent with the Rome Statute of the International Criminal Court and will help to provide the safeguards we seek to prevent the surrender of Americans to the ICC…By signing this bilateral agreement with the United States, the Romanian Government has shown that it understands our position, and the fact that we are not seeking to weaken the ICC or to undermine the integrity of international peacekeeping operations.[48]

This U.S. government view of the aim of Article 98 agreements has clashed with that of ICC supporters, notably the members of the European Union, whose policies are analyzed in Chapter IV. The U.S. search for immunity for its soldiers in peacekeeping roles has been bolstered by adoption of legislation designed to protect American military personnel.

3. American Servicemembers' Protection Act

The United States has taken active measures to ensure that its soldiers never appear before the Court, as the Coalition for the International Criminal Court noted:

> On 2 August 2002, President George W. Bush signed the supplemental appropriations bill, making the American Servicemembers' Protection Act binding US national law. This act includes a provision that authorizes the use of military force to free any citizen of the US or ally country being held by the Court in The Hague. In addition, the law provides for the withdrawal of U.S. military assistance from countries ratifying the ICC treaty, and restricts U.S. participation in United Nations peacekeeping unless the U.S. obtains immunity from prosecution.[49]

America's search for bilateral immunity agreements was complemented by President Bush's signature of H.R. 4775 on 2 August 2002. The President's signature

2003." [http://www.iccnow.org/documents/otherissues/impunityart98/BIASignatories7August03.doc]. Accessed 27 August 2003.

48 "Statement by Philip T. Reeker, Deputy Spokesman of the US State Department: U.S. and Romania Sign Article 98 Agreement: August 1, 2002." [http://www.iccnow.org/resourcestools/statements/governments/USReekerArt98Romania1Auf02.doc]. Accessed 10 March 2003.

49 "United States of America." [http://www.iccnow.org/countryinfo/theamericas/unitedstates.html]. Accessed 16 December 2002.

made the American Servicemembers' Protection Act of 2002 law.[50] Among the findings in Sec. 2002, the American Servicemembers' Protection Act of 2002, are the following:

> (7) Any American prosecuted by the International Criminal Court will, under the Rome Statute, be denied procedural protections to which all Americans are entitled under the Bill of Rights to the United States Constitution, such as the right to trial by jury. (8) …The United States Government has an obligation to protect the members of its Armed Forces, to the maximum extent possible, against criminal prosecutions carried out by the International Criminal Court…(11)…The United States is not a party to the Rome Statute and will not be bound by any of its terms. The United States will not recognize the jurisdiction of the International Criminal Court over United States nationals.[51]

Subject to Presidential waiver under certain conditions and to termination should the United States ratify the Rome Statute, the American Servicemembers' Protection Act of 2002 stipulates in Sec. 2004 (d) a "Prohibition on Extradition to the International Criminal Court". In Sec. 2005 (a) the Act states that the U.S. President should ensure that any American involvement in a mission under Chapter VI or VII of the U.N. Charter will exempt American forces from ICC jurisdiction and prosecution. In Sec. 2007 the Act includes prohibitions on U.S. military assistance to states party to the Rome Statute, subject to Presidential waiver in the national interest and with NATO countries and certain other states exempted. According to Sec. 2008 (a), "The President is authorized to use all means necessary and appropriate to bring about the release of any person described in subsection (b) who is being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court."[52]

The implications of this final provision were vividly demonstrated in an exchange between Pierre-Richard Prosper, the U.S. Ambassador-at-Large for War Crimes Issues, and a British journalist in an "On-the-Record" briefing at the American Embassy in London on 20 September 2002. The journalist asked, in reference to the American

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50 "The American Non-Governmental Organizations Coalition for the International Criminal Court: AMICC: Chronology of the U.S. Opposition to the International Criminal Court: From 'Unsigning' to Immunity Agreements." [http://www.iccnow.org/pressroom/factsheets/FS-AMICC-PostNullification.doc]. Accessed 10 March 2003.

51 H.R. 4775: One Hundred Seventh Congress of the United States of America- "Title II- American Service-Members' Protection Act." [http://www.iccnow.org/documents/otherissues/aspa/aspa.doc]. Accessed 11 March 2003.

52 Ibid.

Servicemembers' Protection Act, "It is right to say that that would authorize the U.S. to use force to invade this country to rescue any prisoner, any U.S. prisoners, doesn't it? I mean, that is right as a matter of law?" Ambassador Prosper replied in part, "basically, it just says 'Mr. President, this is within your range of tools in the toolbox but it's for you to decide what tools are necessary, it's not mandatory, it's not required' and what this President has done is that he obviously accepted the law but decided that what our range of tools should be is Article 98."[53]

Thus, the mere possibility that the American president could resort to force to repatriate an American citizen may induce some countries to sign Article 98 agreements. Though any American use of force against friendly states is highly unlikely, the fact that "all means necessary" are provided for in this Act may create difficulties for the United States in its diplomatic efforts vis-à-vis its closest allies. Additionally, this Act does not specify exemptions on prohibitions of military aid to any non-NATO members of the European Union party to the Rome Statute, which could exacerbate European-American tensions in the future. However, as noted above, the President can waive the prohibition on military assistance. American actions in the summer of 2003 highlighted the scope of the ASPA. On 30 June 2003 the Coalition for the International Criminal Court, a non-governmental organization, noted that:

> The July 1, 2003 ASPA deadline, which coincides with the one year anniversary of the entry into force of the Rome Statute of the ICC, provides that any ICC State Party receiving U.S. military assistance will lose those funds unless a Presidential waiver is issued either on the basis of national security interests or because a country has signed a U.S.-requested ICC immunity agreement by that date.[54]

In a 1 July 2003 "Memorandum for the Secretary of State" U.S. President George W. Bush indicated which states should be granted a waiver of the prohibition on U.S. military assistance per section 2007(a) of the ASPA, either in view of their signature of

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53 H.R. 4775: One Hundred Seventh Congress of the United States of America- "Title II-American Service-Members' Protection Act." [http://www.iccnow.org/documents/otherissues/aspa/aspa.doc]. Accessed 11 March 2003.

54 "Coalition for the International Criminal Court: 'U.S. Threatens to Cut Military Assistance to Nations Supporting the International Criminal Court: *Law Pressures Non-U.S. Allies to Sign ICC Immunity Pacts*'- New York, 30 June 2003." [http://www.iccnow.org/pressroom/ciccmediastatements/2003/06.30.03ASPAdeadline.doc]. Accessed 1 August 2003.

Article 98 agreements with the United States or for reasons of "national interest."[55] According to a Reuters dispatch in the *International Herald Tribune*:

> The United States on Tuesday [1 July 2003] suspended military assistance to almost 50 countries, including Colombia and six nations seeking NATO membership, because they have supported the International Criminal Court and failed to exempt Americans from possible prosecution…The suspension covers international military education and training funds, which mainly pay the cost of educating foreign officers at U.S. institutions, and foreign military funding, which pays for U.S. weapons and other aid.[56]

The Act's passage into law in August 2002 has not improved European-American relations. During an earlier phase of the legislative process the American Servicemembers' Protection Act was approved by the U.S. Senate on 7 December 2001 despite German Foreign Minister Joschka Fischer's October 2001 admonition to U.S. Secretary of State Colin Powell that "adopting the ASPA would open a rift between the U.S. and the European Union on this important issue."[57] Ultimately, however, only the Court's first cases and developing case law will provide initial indications as to whether American concerns are well founded. Only diplomatic negotiations can prevent these three disputes—over the annual renewal of the United Nations Security Council peacekeeping mandate in Bosnia, Article 98 immunity agreements, and the provisions of the American Servicemembers' Protection Act—from significantly damaging the transatlantic relationship.

E. EVALUATION OF THE AMERICAN POSITION

One common criticism leveled against the United States is that the withdrawal of its signature to the Rome Statute is hypocritical and illustrative of American arrogance

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55 "Presidential Determination No. 2003-27, Memorandum for the Secretary of State, Subject: Waiving Prohibition on United States Military Assistance to Parties to the Rome Statute Establishing the International Criminal Court." [http://www.iccnow.org/documents/otherissues/aspa/BushWaiver1July2003.doc]. Accessed 1 August 2003.

56 Reuters, "U.S. stops military aid to nearly 50 nations over court dispute," *International Herald Tribune*, 2 July 2003.

57 "Human Rights News: HRW World Report 2001: International Justice: 'Europe Should Oppose U.S. Law on War Crimes Court.'" [http://www.hrw.org/press/2001/12/ASPAeu1210.htm]. Accessed 22 October 2002.

regarding international laws and norms. This claim is grounded on the fact that the United States helped to draft the Rome Statute, chose to sign it, albeit with reservations, and then withdrew its signature. However, if withdrawal of one's signature to the Rome Statute after participating in its framing and claiming to support its ideals is hypocritical, it would nevertheless be equally if not more hypocritical to maintain signature to a treaty with no intention of ever ratifying it. It is far more honest and transparent to withdraw one's signature from the treaty, particularly if one intends to obstruct its operation, actively or passively, since signing a treaty implies a minimal agreement not to impair its function. In foreseeable circumstances there is no reasonable expectation that the Senate would give its advice and consent to the treaty's ratification.

Furthermore, the United States withdrew its signature because it determined that the ICC was not in its national or international interests, and that it could not in good faith agree to be subject to its provisions. States that signed the treaty for politically expedient reasons or that seek its benefits but do not intend to conform to its rules should consider the hypocrisy of their own actions before criticizing the United States for withdrawing. American firmness in the face of international pressure stems from a long legal and constitutional tradition. The treaty ratification process, which requires a two-thirds majority in the U.S. Senate,[58] ensures that any treaty ratified must be widely accepted, and a treaty's passage into U.S. law once ratified emphasizes the seriousness with which it is regarded.[59] America has demonstrated its commitment to the legal principle of *pacta sunt servanda* in its all-or-nothing approach to international treaties. The British weekly *The Economist* has referred to an American ideology of "exceptionalism"[60] regarding U.S. policy on international treaties and multilateral measures. From a

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58 The United States Constitution: Article II, Section 2, Clause 2. Available from [http://www.house.gov/Constitution/Constitution.html]. Accessed 12 March 2003.

59 An interesting account of the American "treaty record" can be found in an essay by Andrew Moravcsik of Harvard University, "Why is US Human Rights Policy so Unilateralist?" The essay includes a table of major human rights treaties that the United States Senate either never gave its advice and consent to or deliberated over for many years before doing so. Andrew Moravcsik, "Why is U.S. Human Rights Policy So Unilateralist?" in Stewart Patrick and Shepard Forman, eds., *Multilateralism and U.S. Foreign Policy: Ambivalent Engagement* (Boulder, Colorado: Lynne Rienner Publishers, 2002), 357.

60 "Why the apparent hypocrisy, or at least stand-offishness? 'Exceptionalism' is often offered as the answer- the American ideology, laid down in the early constitutional documents, of being both separate and different." -- ("Present at the Creation: A Survey of America's World Role," *The Economist*, 29 June 2002, 24.)

European perspective, it is this exceptionalism that has caused such controversy in European-American relations, influencing the development of European Union policy toward the Court and the EU response to American actions.

III- THE EUROPEAN UNION'S POSITION ON THE ICC: ANALYSIS AND EVALUATION

A. EUROPEAN UNION POLICY TOWARD THE ICC

The withdrawal of the United States signature to the Rome Statute caused consternation in European Union countries and generated considerable debate about both the Court and the more complex issues of American unilateralism and the perceived split between European and American views of the requirements of international order. The disagreement over the International Criminal Court can be framed within the broader context of the myriad issues in U.S.-European relations as well as the traditions and perspectives that European Union countries bring to bear on the issue. European Union positions in this matter reflect consistent support for the Court since the Rome Statute was framed and opened for signature in 1998. This support has shaped European Union reactions to the U.S. withdrawal of America's signature to the Rome Statute from the Court in 2002 and subsequent U.S. actions regarding the ICC.

Every European Union member state[61] has expressed support for the Court by ratifying the Rome Statute, and the Union has stated its official position supporting the ICC. Institutionally, the European Union has expressed considerable support for the Court and its acceptance by as many states as possible. The Union outlined its basic policy in its "Council Common Position of 11th June 2001 On the International Criminal Court":

> (3) The principles of the Rome Statute of the International Criminal Court, as well as those governing its functioning, are fully in line with the principles and objectives of the Union. (4) The serious crimes within the jurisdiction of the Court are of concern for all Member States, which are determined to cooperate for the prevention of those crimes and for putting an end to the impunity of the perpetrators thereof. (5) The Union is convinced that compliance with the rules of international humanitarian

61 "All fifteen EU Member States and most of its associated and acceding countries have ratified the Rome Statute." From an article in the "ICC Monitor" : "The International Criminal Court Monitor: The Newspaper of the NGO Coalition for the International Criminal Court- Issue 23, February 2003." [http://www.iccnow.org/publications/monitor/23/Monitor23.200302English.pdf]. Accessed 7 March 2003.

> law and human rights is necessary for the preservation of peace and the consolidation of the rule of law.[62]
>
> The establishment of the International Criminal Court, for the purpose of preventing and curbing the commission of the serious crimes falling within its jurisdiction, is an essential means of promoting respect for international humanitarian law and human rights, thus contributing to freedom, security, justice and the rule of law as well as contributing to the preservation of peace and the strengthening of international security, in accordance with the purposes and principles of the Charter of the United Nations.[63]

Subsequently, the European Council published its "Council Common Position 2002/CFSP Amending Common Position 2001/443/CFSP on the International Criminal Court," which discussed the imperative for members to promote "the objective of the widest possible participation in the Statute" via various forms of assistance to states aspiring to become party to the Court. European Council Common Position 2002/CFSP stated:

> In order to contribute to the objective of the widest possible participation in the Statute, the European Union and its Member States shall make every effort to further this process by raising the issue of the widest possible ratification, acceptance, approval of or accession to the Rome Statute and the implementation of the Statute in negotiations or political dialogues with third States, groups of States or relevant regional organisations, whenever appropriate.[64]

The European Union also drafted an "Action Plan to Follow-Up on the Common Position on the International Criminal Court": "On 28 February 2002, the European Parliament approved a resolution on the ICC which, inter alia, called for the adoption of an EU action plan in furtherance of the Common Position."[65] This action plan addressed the "coordination of EU activities" and the "ratification and implementation of the Rome Statute in Third Countries," among other issues.[66] The official European Union position has also expanded to include hopes for increased cooperation with the United States on

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62 "Conference on 'The EC support for the establishment of the ICC', Brussels, January 28-29 of 2002." [http://europa.eu.int/comm/europeaid/projects/eidhr/pdf/cpi-documents-synthese2002_en.pdf].
63 Ibid.
64 Ibid.
65 Ibid.
66 Ibid.

matters involving the Court. The Council of the European Union's 30 September 2002 "Draft Council conclusions on the International Criminal Court" stated this goal: "The Council expresses its hope that the United States will continue to work together with its allies and partners in developing effective and impartial international criminal justice. To this end, the Council proposes to develop a broader dialogue between the European Union and the United States on all matters relating to the ICC, including future relations between the United States and the Court."[67]

Despite opposition from the United States government, Human Rights Watch encouraged the European Union to stand firm in its support of the Court:

> Human Rights Watch urged European Union governments to redouble their efforts to ensure the early entry into force of the ICC treaty. Because some states intending to ratify the ICC treaty may now be intimidated by the new U.S. legislation, EU governments should offer reassurances that they stand more firmly than ever behind the court, Human Rights Watch said.[68]

The European Union position on the International Criminal Court and its response to the American withdrawal highlight the differences of opinion on this infant institution. The European Union's position has evolved slightly since the drafting of the Rome Statute in 1998, but it has consistently expressed strong support for wide acceptance and implementation of the Rome Statute and attempted to address certain American concerns.[69] The policies of three influential members of the European Union—France, Germany and the United Kingdom—illustrate the support for the Court within the EU.

The United Kingdom's response to the American position on the International Criminal Court may be the most subdued of any European Union country. Its "special

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[67] "Council of the European Union- Brussels, 30 September 2002: Draft Council conclusions on the International Criminal Court." [http://www.iccnow.org/documents/declarationsresolutions/intergovbodies/EUConclusions30Sept02.doc]. Accessed 10 March 2003.

[68] "Human Rights News: HRW World Report 2001: International Justice: 'Europe Should Oppose U.S. Law on War Crimes Court.'" [http://www.hrw.org/press/2001/12/ASPAeu1210.htm]. Accessed 22 October 2002.

[69] The EU decided to allow its members to negotiate separate immunity agreements with the United States, subject to certain restrictions- see later citation from: "EU outlines conditions for non-surrender agreements with the USA." [http://eng.bundesregierung.de/dokumente/Artikel/ix_442531.htm]. Accessed 15 November 2002.

relationship" with the United States has enabled Britain to support and defend American policies with which it agrees, while more easily understanding and accepting those it opposes. In a press conference on 28 June 2002 when queried, "But if you can't get him [U.S. President George W. Bush] to play nice back, on Kyoto for instance or on the International Criminal Court or other subjects that are important to Britain and to you, then it looks one-sided," British Prime Minister Tony Blair responded:

> I think you would have to say that that is always going to be the case, there are always going to be differences between us…I think the relationship is basically good and of course there are going to be differences, but this idea that because America doesn't do everything that Britain or Europe wants that means the relationship is one-sided I think is nonsense, because both sides gain a lot from it.[70]

Though it supports the Court, Britain has demonstrated its willingness to refrain from criticizing the American position on the issue. Such acceptance from a fellow permanent member of the UN Security Council and supporter of American policies in Iraq and in the campaign against terrorism is critical for an American administration now facing the political repercussions of its withdrawal of the U.S. signature from the Rome Statute. British support for the ICC could shift based on its foreign military commitments in the future, as London's *Daily Telegraph* suggested in November 2002: "The Government is concerned that British servicemen and women involved in any war against Iraq could find themselves facing action from the International Criminal Court, defence sources said yesterday."[71] This concern appears to have some foundation, in that the Athens Bar Association in July 2003 "filed a lawsuit at the International Criminal Court in the Hague…seeking the indictment of Tony Blair, the UK prime minister, on war crimes charges over the attack against Iraq."[72] Thus, though the United Kingdom supports the Court, it appears committed to maintaining its positive relationship with the United States and exhibits a sensitive understanding of the U.S. position, given American military commitments worldwide.

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[70] 10 Downing Street Newsroom: Press Conference by the Prime Minister Tony Blair: 28 June 2002. [http://www.numer-10.gov.uk/output/page5390.asp]. Accessed 4 December 2002.
[71] Michael Smith, "'War crimes' fear for British troops." *The Daily Telegraph (London)*. 6 November 2002. Available from [http://www.lexis.com/research]. Accessed 15 November 2002.
[72] Kerin Hope and Nikki Tait, "Greeks try to indict Blair for Iraq war," *Financial Times*, 29 July 2003, 3.

German reaction to the U.S. withdrawal has been perhaps the most predictable. The Federal Republic of Germany has been a staunch supporter of the Court from its early beginnings in 1998, which seems consistent with its strong post-1949 tradition of sensitivity to human rights and international justice. Given its leading economic role in European affairs and organizations, Germany's opposition to the U.S.-led military campaign in Iraq in March-April 2003 and to the withdrawal of the U.S. signature from the Rome Statute is cause for concern. In September 2002 *The Economist* noted that:

> Mr. Bush's administration is not getting a good German press. The list of gripes is long: many Germans deplore Mr. Bush's hostility to the International Criminal Court….the Americans' apparently growing unilateralism; and now its policy on Iraq. At home it does Mr. Schroeder no harm to be bravely standing up to the perceived American bully.[73]

The official German position remains strongly in favor of the ICC, as Juergen Chrobog, State Secretary, Ministry for Foreign Affairs, highlighted on 9 September 2002:

> I therefore call upon all signatory states that have not yet ratified the Rome Statute to do so as soon as possible. And I appeal to all states that have reservations about the Court to overcome their misgivings and adopt a policy of good neighbourliness to the ICC. We are ready to accommodate them. But it must be clear that the solutions to any problems they may have cannot violate the key obligation of all States Parties to cooperate fully with the Court...Germany continues to believe that making the International Criminal Court an effective and credible instrument for the prosecution of war crimes, crimes against humanity, genocide and crimes of aggression is of prime importance.[74]

When faced with the U.S. position on the Court and U.S. pressure on governments to conclude separate agreements excluding U.S. personnel from the Court's jurisdiction, the German position remained firm yet tempered by a desire to seek EU consensus:

> Speaking on this issue in Brussels, Federal Foreign Minister Joschka Fischer said: 'We are against the conclusion of special agreements and will also not sign any ourselves.' On the fringe of the conference,

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73 "Why Gerhard Schroder has gone out on a limb." *The Economist*, 14 September 2002. Available from [http://www.lexis.com/research]. Accessed 22 November 2002.

74 Permanent Mission of Germany to the United States: Statement by Mr. Juergen Chrobog, State Secretary, Ministry for Foreign Affairs, First Assembly of States Parties to the Rome Statute, 9 September 2002. [http://www.iccnow.org/html/GermanyASP9Sept02.pdf]. Accessed 15 October 2002.

> however, he admitted there was a need for a common position of the EU member states.[75]

In late 2002 German Foreign Minister Fischer emphasized the need for common European Union action vis-à-vis the ICC. "In Brussels…the German foreign minister, Joschka Fischer, again called for EU unity: 'The main concern is that Europeans stand together and that they do so on the basis of strengthening the statutes of the Court.'"[76] The German "Gesellschaft fuer Voelkerstrafrecht" (International Criminal Law Society) issued a press release in Berlin expressing the opinion that it would be dangerous to relent under U.S. pressure:

> Moreover, the conclusion of the proposed agreement with the US would serve as a very bad example. Other states opposed to the ICC would probably feel encouraged to seek similar agreements and thereby limit the Court's jurisdiction even further… We are today facing the danger of an international community dividing into two classes with a different set of rules applying depending on the political and military strength of a government. This is a threat to the one principle lying at the basis of international relations- the principle of sovereign equality of states. To undermine this principle would mean to undermine the integrity of international law.[77]

Germany strongly supports the Court and seems unlikely to be pressured into negotiating with the United States on the issue.

France has also been highly supportive of the newly founded International Criminal Court, and its skeptical view of American policy can be traced to certain recurring themes in Franco-American relations. During the Cold War France had an almost reluctant partnership with the United States, whereby it often sought to assert its autonomy, such as when it exited NATO's integrated military command structure.[78] Recent French foreign policy has focused on European matters and has often clashed

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75 "EU outlines conditions for non-surrender agreements with the USA." [http://eng.bundesregierung.de/dokumente/Artikel/ix_442531.htm]. Accessed 15 November 2002.

76 "EU seeks common position towards the USA in relation to the International Criminal Court.": 7 October 2002. [http://eng.bundesregierung.de/dokumente/Artikel/ix_442791.htm]. Accessed 15 November 2002.

77 ICLS- International Criminal Law Society- Press release: "The latest US-campaign against the International Criminal Court." [http://www.iccnow.org/html/pressicls20020901english.doc]. Accessed 15 October 2002.

78 Henry Kissinger, *Diplomacy* (New York: Simon & Schuster, 1994), 612.

with American views and policies, as *The Economist* noted in its summer 2002 survey of America's role in the world:

> [D]isgruntled allies…can make life even harder for America by accepting its leadership but also surreptitiously selling trouble-makers the wherewithal to cause more trouble, such as missile technology or nuclear materials, or merely doing investment deals with the pariahs. That is what France, China and Russia have been doing, to different degrees, in recent years, in particular in Iraq.[79]

France's support for the ICC has been clear, as stated by French Minister of State for Foreign Affairs Renaud Muselier at the 57th UN General Assembly in New York on 10 September 2002:

> We have travelled a long road to make the International Criminal Court a reality. But our task did not end on 1 July 2002 when the Rome Statute entered into force. We still have a crucial goal to reach: making the Court a universal institution…Without the cooperation of States, the ICC will be a court only on paper. Even more than the international criminal courts, this court would be powerless if States failed to cooperate.[80]

In March 2002 French Foreign Minister Hubert Vedrine presented his conception of the European view of American behavior:

> Europe is genuinely perplexed when faced with a US administration which, in just over a year, has opposed the Kyoto Protocol (on climate change), the International Criminal Court and several disarmament agreements, while abusing its veto at the UN Security Council on Middle East issues…We feel this heavy-handed tendency is increasing. The United States is certainly not the only country that believes it has a universal mission, but it is the only one that has the means for it and thinks this role entirely legitimate.[81]

The French view of European opinions of America was also noted in *The Economist:* "This week, Le Monde, noting that Europeans see Americans as 'arrogant,

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79 "Present at the Creation: A survey of America's world role," *The Economist*, 29 June 2002, 3-34.

80 "Fifty-Seventh United Nations General Assembly: Speech by M. Renaud Muselier, Minister of State for Foreign Affairs, New York, 10 September 2002." [http://www.diplomatie.gouv.fr/actual/declarations/bulletins/20020911.gb.html].

81 "French FM Renews Attack on US Foreign Policy," first published 05 March 2002- Paris, March 1 (AFP), in "The Tocqueville Connection: The insider's web source for French news and analyses." [http://www.ttc.org/cgi-binloc/getzip.cgi?0+4363]. Accessed 11 December 2002.

bellicose and deaf to all criticism', decried a new period of American 'messianism'."[82] The United States has reason to be sensitive to French concerns about its policies, particularly on the issue of the Court, given France's leading role in the EU and its status as a permanent member of the U.N. Security Council.

B. FOUNDATIONS OF THE EUROPEAN UNION POSITION

The European Union position on the ICC has foundations in decades of constructing supranational institutions. The European Union's current effort to draft a constitution illustrates how its member states are comfortable with supranational authorities and institutions. In the 18 July 2003 "Draft Treaty establishing a Constitution for Europe," Article 1 states that "this Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common" and Article 2 states that "The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights. These values are common to the Member States in a society of pluralism, tolerance, justice, solidarity and non-discrimination."[83] These articles highlight the concept of European Union states transferring certain powers to a central organization in the interests of justice, peace, and efficiency. Their desire to embrace international judicial institutions such as the ICC is probably related to their willingness to participate in a semi-federal system.

The commitment of many European Union governments to the Court is apparent given their current efforts to adapt their constitutional and legal systems to accommodate the ICC's provisions. Three of Europe's most powerful states, France, Germany and the United Kingdom, have all begun integrating elements of the Rome Statute into their respective national systems. The United Kingdom passed its "ICC Act of 2001" that "incorporates into domestic law the offences in the Rome Statute and makes provisions

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82 "Chilly in the west, warmer in the east." *The Economist*, 25 May 2002. Available from [http://www.lexis.com/research]. Accessed 22 November 2002.

83 "The European Convention: The Secretariat: Brussels, 18 July 2003: 'Draft Treaty establishing a Constitution for Europe.'" [http://european convention.eu.int/docs/Treaty/cv00850.en03.pdf]. Accessed 5 August 2003.

for them to be dealt with domestically in the Crown Court,"[84] Germany's "Bundestag (Parliament) unanimously approved the draft act on the Code of Crimes against International Law (which consolidate and complete the list of criminal offences under German domestic law, paralleling the crimes under the Rome Statute) as well as the draft act on implementing legislation" on 25 April 2002,[85] and "The French Parliament adopted the Bill on Cooperation in February 2002" which "allows France to cooperate with the Court with regard to arrest, transfer, prison sentences and reparation orders."[86]

European Union countries have considerable experience with transnational legal institutions whose decisions have affected their policies. British barrister Geoffrey Robertson argues in his seminal work *Crimes Against Humanity: The Search for Global Justice*:

> What has made the European Court stand head and shoulders above any UN or other regional arrangement is the simple fact that adverse decisions are implemented, under supervision. State parties comply (albeit sometimes not quickly or adequately) with its rulings, even though they generally require legislation or some restructuring of the domestic legal system. It has now become a constitutional court for the whole continent.[87]

Robertson endorses the example set by European Union institutional efforts: "The European Court of Human Rights has become the model human rights court, proof positive that international law can work to enforce fundamental freedoms across a swathe of countries with some differences in culture and tradition."[88]

European Union governments have had extensive experience with supranational legal and government institutions, and this contributes to their willingness to accept the Court's authority. Karen J. Alter, assistant professor of government at Smith College, contends that "The European Union has the most effective international legal system in existence, standing in clear contrast to the typical weakness of international law and

84 "United Kingdom." [http://www.iccnow.org/countryinfo/europecis/unitedkingdom.html]. Accessed 10 March 2003.
85 "Germany." [http://www.iccnow.org/countryinfo/europecis/germany.html]. Accessed 10 March 2003.
86 "France." [http://www.iccnow.org/countryinfo/europecis/france.html]. Accessed 10 March 2003.
87 Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (New York: The New Press, 2000), 61.
88 Ibid., 62.

international courts…In Europe, the European Court of Justice (ECJ) hears many cases, and its jurisprudence shapes state behavior. There is an international rule of law that truly works in Europe."[89]

The tendency of European Union countries to actively support the ICC probably reflects unique European traditions and perspectives. European acceptance of federative solutions has been shaped by the lingering memory of the destruction and trauma of the Second World War, which bred legitimate concerns for security and stability on the European continent. Concepts of European community, institutionalized in the European Coal and Steel Community (ECSC), the European Economic Community (EEC), and the Maastricht Treaty on European Union,[90] illustrate this post-war European trend toward communitarian behavior. Integration among European countries often competes, however, with parochial interests and national pride. Moreover, a shared desire to atone for failures of humanitarian interventions in the 1990s from Rwanda to Bosnia may help to explain the European Union's willingness to support the Court. [91]

European Union support for the Court is consistent with views of power, international relations, and the rule of law in the EU countries. According to Robert Kagan, "European strategic culture" is comprised of the following elements:

> the emphasis on negotiation, diplomacy, and commercial ties, on international law over the use of force, on seduction over coercion, on multilateralism over unilateralism…This is what many Europeans believe they have to offer the world: not power, but the transcendence of power. The "essence" of the European Union, writes [Steven] Everts, is "all about subjecting inter-state relations to the rule of law," and Europe's experience of successful multilateral governance has in turn produced an ambition to convert the world.[92]

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[89]Karen J. Alter, "The Making of a Supranational Rule of Law: The Battle for Supremacy" in Ronald Tiersky, ed., *Europe Today: National Politics, European Integration, and European Security* (Lanham, Maryland: Rowman & Littlefield Publishers, Inc., 1999), 305.

[90]Ronald Tiersky, ed., *Europe Today: National Politics, European Integration, and European Security* (Lanham, Maryland: Rowman & Littlefield Publishers, Inc., 1999), 241, 243, 262.

[91] According to Margaret Thatcher, "Peace and stability have returned to the region [the Balkans] despite, not because of, the European Union's efforts." Margaret Thatcher. *Statecraft: Strategies for a Changing World* (New York: HarperCollins Publishers, 2002), 317.

[92] Kagan, Robert. "Power and Weakness." *Policy Review*, June 2002. Available from [http://www.policyreview.org/JUN02/kagan_print.html]. Accessed 29 July 2002.

Cultural differences aside, this disagreement comes at an important time for the Atlantic Alliance, when European Union countries face challenges that promise to determine the future of the continent. These challenges include an enlarging membership and efforts at greater cohesion, as typified by debate over a constitution for Europe. Hence, European Union countries are forced to balance national sovereignty with regional integration, while also adapting their political and economic systems to accommodate new members.

The continuing debate over the future relevance and roles of NATO, featured most recently at the Alliance's Prague Summit in November 2002,[93] also challenges European countries to address difficult military and foreign policy issues. This challenge is particularly poignant given current attitudes in many European countries toward defense expenditures,[94] the military establishment, and intervention in foreign crises. Certain European countries also face difficult prospects of mending diplomatic relations with the United States in the wake of the American-led invasion of Iraq in March-April 2003 to topple the regime of dictator Saddam Hussein.

Many Europeans also view the withdrawal of the United States signature from the Rome Statute as yet another of America's refusals to submit itself to standards and obligations accepted by other nations, including EU states. The United States previously refused to adhere to the Comprehensive Test Ban Treaty, the Ottawa Landmine convention and the Kyoto Protocols on global warming. Baroness Shirley Williams, a "longtime member of the House of Commons and a former education minister…and now leader of the Liberal Democrats in the House of Lords," commented on this American behavior with respect to international treaties:

> We Atlanticists, dedicated to building global respect for democracy and the rule of law, were saddened by the reluctance of Congress to take part in laying what we saw as the essential foundation stones. These were the

93 Karen DeYoung and Keith B. Richburg, "NATO Approves New Direction; Enlarged Alliance to Reorganize Forces; Leaders Endorse Statement on Iraq." *The Washington Post (washingtonpost.com)*, 22 November 2002. Available from [http://www.lexis.com/research]. Accessed 11 December 2002.

94 Alexander Nicoll, "Plain speaker waves Union Jack: Mike Turner of has lost no time in lobbying the government for nothing less than change in how it does defence business, writes Alexander Nicoll." *Financial Times (London)*, 3 July 2002. Available from [http://www.lexis.com/research]. Accessed 12 December 2002. : BAE's Mike Turner notes that "The increase in US defence spending over the next five years is greater than entire European defence spending."

> International Criminal Court, the Kyoto Protocols to the Climate Change Convention and the network of arms control agreements ranging from the Biological Weapons convention to a revised ABM Treaty. They extended later to the proposals for dealing with heavily indebted poor countries and limiting exports of arms. None attracted the support of the Bush administration.[95]

Britain's *The Economist* expressed the views of many Europeans when faced with such American policies: "Kyoto and the international court have, in effect, become the two most powerful witnesses deployed in the anti-Americans' case, especially in Europe: look, the critics are able to say, the United States is in favour of pollution and against justice."[96] Though U.S. Presidents and Members of Congress have rejected such treaties for sound reasons, their justifications have often been poorly communicated, resulting in the widespread impression that the United States considers itself "above the law." America's reluctance to subordinate itself to many international organizations, despite its founding role therein, causes friction at a time when European Union countries are increasing their involvement in them. Historically, European countries have supported international treaties and willingly accepted certain levels of international oversight and regulation, particularly in the context of the European integration process underway since 1951, manifest today in the European Union.

The predominant European position supports the ideals of the International Criminal Court and its full implementation as currently constituted. This position finds no contradiction between a world court with broad jurisdiction and individual constitutional guarantees, and it is skeptical of American reticence about the Court. From the European perspective, American concerns have been adequately addressed and continued American insistence on opposing the Court will only inflame diplomatic frustrations on both sides.

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95 Williams, Shirley. "Please, America, Listen to Your Foreign Friends." *International Herald Tribune*, 29 March 2002. Available from "The Tocqueville Connection: The insider's web source for French news and analyses." [http://www.ttc.org/cgi-binloc/getzip/cgi?0+4576]. Accessed 11 December 2002.

96 "Present at the Creation: A survey of America's world role," *The Economist*, 29 June 2002, 3-34.

C. EUROPEAN REACTIONS TO U.S. POST-MAY 2002 ICC POLICIES

It is not surprising that U.S. actions since the May 2002 withdrawal of its signature from the Rome Statute have caused concern among European allies. European Union countries have generally opposed moves by the United States to shield its personnel from the ICC's jurisdiction since May 2002, yet have cooperated where necessary to ensure the integrity of the ICC as well as broader interests such as implementation of the United Nations Security Council peacekeeping mandate in Bosnia-Herzegovina. The U.S. search for Article 98 "immunity agreements" has been the most divisive issue, however, since it is at the heart of current fault lines in Europe between established members of the European Union and potential future members. The Article 98 issue has highlighted divisions between what some have termed "Old Europe" and the "New Europe" consisting of eastern European, predominantly former Soviet-bloc, states that have sought advantage in aligning themselves more closely with the United States on a range of issues, including the global war on terrorism.

1. United Nations Peacekeeping Operations

The controversy in June and July 2002 surrounding the American veto of extension of the United Nations Security Council mandate for the Bosnia peacekeeping mission, until adequate protections for US peacekeepers from ICC jurisdiction existed, compelled European countries, particularly France and the United Kingdom, to grant concessions to the United States. This issue illustrated the subtle power politics involved in the debate over the ICC, as European countries that support the Court were nonetheless persuaded to grant exemptions to American peacekeepers in order to maintain the integrity of the mission in the former Yugoslavia. Thus, in an early test of American diplomacy regarding the Court, it became clear that at least in some circumstances the United States has favorable prospects for securing acquiescence, if only grudging and in service to other interests, to its demands concerning the ICC.

At a meeting of the U.N. Security Council on 12 June 2003, Greek Ambassador and Permanent Representative to the United Nations Adamantios Th. Vassilakis, speaking on behalf of the European Union, noted that:

> The European Union is of the view that the inclusion in resolution 1422 (2002) of the phrase "renew the request…under the same conditions each 1 July for further 12-month periods for as long as may be necessary" (*resolution 1422 (2002), para. 2)* cannot be interpreted as permitting the automatic renewal of that resolution without taking into account the specific conditions under which such a request is being made. The European Union firmly believes that an automatic renewal of that resolution would undermine the letter and the spirit of the Statute of the International Criminal Court and of its fundamental purpose—to put an end to impunity for the most serious crimes of concern to the international community by bringing to justice in all cases all those within the Court's jurisdiction.[97]

Furthermore, the Parliamentary Assembly of the Council of Europe stated in Resolution 1336 (2003)[1]:

> 6. The Assembly regrets the renewal, as decided on 12 June 2003, of Security Council Resolution 1422 (adopted on 12 July 2002). This Resolution had deferred for a renewable 12 months any prosecution by the International Criminal Court of those suspected of offences committed in connection with a United Nations authorised operation who are nationals of states that are not parties to the Statute. It commends those countries which insisted that an open debate was held in the Security Council and that the exemption was again limited to one year.
>
> 7. It considers that Resolution 1422 and its renewal constitutes a legally questionable and politically damaging interference with the functioning of the International Criminal Court. Its independence from the UN Security Council, with regard to the opening of procedures against persons suspected of international crimes, is one of the most important advances in the Rome Statute.[98]

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97 "United Nations Security Council, Fifty-eighth year, 4772nd meeting- Thursday, 12 June 2003, New York." [http://www.icccnow.org/documents/otherissues/1422/UNSCpv1422debate12June03.pdf]. Accessed 28 July 2003.

98 "Parliamentary Assembly, Council of Europe: Provisional edition, 'Threats to the International Criminal Court', Resolution 1336 (2003)[1]." [http://www.iccnow.org/documents/declarationsresolutions/intergovbodies/CoEResBIAs25June03Eng.doc]. Accessed 28 July 2003.

In addition to opposing American efforts to gain exemptions for U.S. soldiers in U.N. peacekeeping missions, the European Union rejects the American search for bilateral immunity agreements.

2. Article 98 "Immunity Agreements"

The European Union has generally resisted America's efforts to negotiate separate bilateral Article 98 agreements with other countries. It first allowed some bilateral agreements based on minimal standards and then amended its policy to reject such agreements. This shift in policy highlights the degree to which European Union countries were willing to consider and attempt to alleviate American concerns, even though America's withdrawal of its signature from the Rome Statute is viewed by many as a "slap in the face" to its European partners and to institutions and practices of international law. The solidification of EU policy against American efforts to conclude Article 98 agreements also illustrates likely implications for the United States if it continues to put pressure on countries to make such accords. Though the official European Union position on such agreements appeared resolute, it was temporarily modified to accommodate America's wishes for immunity for its peacekeepers. The Coalition for the International Criminal Court outlined the initial EU position:

> The common position, which reaffirms the EU's commitment to uphold the integrity of the Rome Statute, firmly rejects the US-proposed agreements as inconsistent with international law, emphasizes the need to assess existing bilateral agreements to determine the necessity of additional agreements, and establishes a 'bottom line' set of principles to which each Member State must adhere in its negotiations of any such arrangement.[99]

According to an October 2002 press release from the German government, the conditions by which independent agreements should be governed were expanded as follows:

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99 Coalition for the International Criminal Court: "'EU Council Approves Common Position Rejecting US Bilateral Agreements', New York, 30 September 2002." [http://www.iccnow.org/html/pressrelease20020930.doc]. Accessed 15 October 2002.

> On 30 September 2002, in Brussels, the foreign ministers of the 15 EU member states agreed a common position on American proposals for the exemption of US citizens from the jurisdiction of the International Criminal Court (ICC)…In many cases, so-called Status of Forces Agreements and extradition treaties already regulate whether an individual can be extradited to the USA. If a country still wishes to conclude a separate agreement with the USA concerning the ICC, the EU insists on the following guiding principles:
>
> *Exclusion of a general immunity from punishment. Individuals who are not surrendered to the ICC must stand trial in the USA.
>
> *Only US citizens working abroad on behalf of the American government, i.e. soldiers and diplomats, are to be exempted from the jurisdiction of the ICC.
>
> *Exemption should not apply to citizens of the country that concludes an agreement with the USA. They should still be surrendered to the ICC.[100]

The Economist commented in October 2002 on what it viewed as a license for individual EU members to deviate from the official European Union position: "This week the EU front collapsed. The British, Spaniards and Italians proved readier to break ranks than to break with their superpower ally. EU foreign ministers agreed that each of the 15 members could sign up with the United States to whatever it chose, subject to some EU guidelines, which are supposed to ensure that wrongdoers not sent to the ICC face their own national courts."[101] A few days later Amnesty International argued that nations should avoid separate agreements with the United States: "Amnesty International today urged the foreign ministers of France, Italy, Spain, and the United Kingdom not to sign agreements granting impunity [*sic*] to US nationals accused of genocide, crimes against humanity and war crimes."[102] What began as an officially unified European Union position was modified to allow certain national concessions under American pressure; however, continued American efforts precipitated a shift in EU policy.

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100 "EU outlines conditions for non-surrender agreements with the USA." [http://eng.bundesregierung.de/dokumente/Artikel/ix_442531.htm]. Accessed 15 November 2002.

101 "Uncle Sam lays down the law." *The Economist*, week of 5 October 2002. Available from [http://www.lexis.com/research]. Accessed 22 November 2002.

102 Amnesty International Press Release, 11 October 2002: "International Criminal Court: Foreign ministers of France, Italy, Spain, and the UK should say no to impunity agreements." [http://web.amnesty.org/ai.nsf/recent/IOR300082002!Open]. Accessed 15 October 2002.

In response to American entreaties, the European Council drafted guiding principles on this issue on 30 September 2002, declaring that states could only sign agreements with the United States if they met the following conditions:

> *No impunity: A guarantee that an appropriate investigation and potential prosecution would be undertaken by national jurisdictions.
> *No reciprocity: The exclusion of nationals of ICC States Parties from coverage of such an agreement.
> *No universal scope: The limitation of coverage to those persons present in a territory because they have been sent by a sending State (i.e., those conducting official business).
> *Ratification: The agreement must be approved according to the constitutional procedures of each individual state.[103]

However, despite these guidelines, Human Rights Watch noted that, "As of January 27, 2003, Washington has had NO success: EU Members have so far refused to deviate from the EU position."[104]

On 19 September 2002 the European Parliament drafted a "Common Motion for a Resolution" expressing the following opinion: "Deeply disappointed by the decision of the Romanian government to sign an agreement with the U.S. contradicting the spirit of the status of the ICC and worried that three other applicant countries, Czech Republic, Lithuania, [and] Malta haven't yet ratified the treaty."[105] This issue threatens to divide Europe between current EU member states and those striving for EU membership. However, no EU member state has concluded an Article 98 agreement with the United States, and the EU position remains firm. The European Parliament's draft motion continued: "whereas the current world-wide political pressure by the Government of the United States of America to persuade States Parties and Signatory States of the Rome Statute as well as non-signatory states to enter into bilateral immunity

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103 "Washington Working Group on the International Criminal Court: Bush Administration Demands Immunity Agreement." [http://www.wfa.org/issues/wicc/article98/article98home.html]. Accessed 22 October 2002.
104 Human Rights Watch – "Bilateral Immunity Agreements: A Background Briefing, March 2003." [http://www.hrw.org/campaigns/icc/docs/bilateralagreements.pdf]. Accessed 7 March 2003; underlining and capitalization in the original.
105 "European Parliament: Common Motion for a Resolution, 19 September 2002." [http://www.iccnow.org/documents/declarationsresolutions/intergovbodies/EP%20Resolution_19Sept02.doc]. Accessed 10 March 2003.

agreements…should not succeed with any country, in particular with the EU Member States, [and] the applicant countries to the EU."[106]

The Council of Europe's Parliamentary Assembly Resolution 1336 (2003)[1] also stated, in reference to the U.S. attempt to secure Article 98 immunity agreements:

> The Assembly condemns the pressures exercised on a number of member states of the Council of Europe to enter into such agreements and regrets that the contradictory demands made on them by the United States on the one side and the European Union and the Council of Europe on the other confronts them with a false choice between European and transatlantic solidarity. The Assembly considers that all countries should be left free to decide on their stance towards the International Criminal Court on the basis of considerations of principle alone.[107]

Additionally, the European Union has solidified its position regarding Article 98 agreements sought by the United States. According to a "Coalition for the International Criminal Court" press release on 10 June 2003: "[T]he EU Political and Security Committee today adopted a revised Common Position reinforcing EU support for the International Criminal Court (ICC). The new EU Common Position includes for the first time a call to prevent the signature of US-proposed non-surrender agreements [that is, "Article 98 agreements"] amidst increased US pressure [on the EU] to disengage from influencing countries involved in US negotiations."[108] The EU position has thus evolved during the course of this dispute from first accommodating U.S. concerns in certain instances and then later rejecting the negotiation of bilateral agreements. This hardening of European Union policy is based on controversial U.S. actions since the May 2002 withdrawal of the U.S. signature. Whether EU member states will remain united in opposition to American pressures to conclude Article 98 agreements may determine the course of this dispute in the future. Furthermore, the United States government may learn

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106 "European Parliament: Common Motion for a Resolution, 19 September 2002." [http://www.iccnow.org/documents/declarationsresolutions/intergovbodies/EP%20Resolution_19Sept02.doc]. Accessed 10 March 2003.

107 "Parliamentary Assembly, Council of Europe: Provisional edition, 'Threats to the International Criminal Court', Resolution 1336 (2003)[1]." [http://www.iccnow.org/documents/declarationsresolutions/intergovbodies/CoEResBIAs25June03Eng.doc]. Accessed 28 July 2003.

108 "Coalition for the International Criminal Court: 'European Union Forms New Common Position Reinforcing Support of the International Criminal Court', New York, 10 June 2003." [http://www.iccnow.org/pressroom/ciccmediastatements/2003/06.10.03Euon1422.doc]. Accessed 10 June 2003.

a valuable lesson about the possible negative effects of its ICC policies with regard to relations with its partners in the European Union.

3. American Servicemembers' Protection Act

U.S. passage of the American Servicemembers' Protection Act has inflamed European opinion, particularly given earlier efforts by the European Union to address U.S. concerns and allow its members to negotiate on the issue of immunity on a limited basis. Additionally, provisions distinguishing between NATO and non-NATO EU members regarding military assistance by the United States could damage U.S. relations with European states that are not NATO members. Provisions for the use of force to repatriate an American citizen detained by the Court, including the legislation's implicit if far-fetched authorization of forceful intervention against the Netherlands (the site of the ICC's headquarters in The Hague) to this end, indicate a further lack of trust in international legal institutions and in an American ally in Europe.

British barrister Geoffrey Robertson reacted to an earlier version of this law in the following manner:

> The Bush administration's real irresponsibility, however, had come on 25 September 2001 when it gave its support for the American Servicemembers' Protection Act (ASPA) which sought to prohibit military aid to countries which ratify the Rome Statute (with the exception of allies like NATO and Israel) and to give the President power to use military force against any country which detains US soldiers on ICC arrest warrants. This 'bomb the Hague bill' promoted by Senator [Jesse] Helms and Henry Kissinger so appalled European coalition partners in the 'war on terror' that the White House quietly prevailed on the Bill's backers to withdraw it from the Senate. When allies become more disposable, there is every prospect that the Bill will return. It is, after all, consonant with the American position on international justice (as on Kyoto, and the Children and Landmines Conventions), namely that it is good for other countries, but not for the US.[109]

[109] Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (New York: The New Press, 1999), 391.

The United States has, as Robertson predicted, renewed this measure. The President signed the Act of Congress, and the ASPA became law in August 2002. The effect on European opinion is understandable given the sensitive military aid issues involved and the European Union position on the ICC. Further ramifications of this law are explored in Chapter V.

D. EVALUATION OF THE EUROPEAN UNION POSITION

European Union reactions to the United States policy on the ICC are often as much reactions to the unilateralist pattern and perceived arrogance of American foreign policy as they are specifically addressed to the legal and practical issues surrounding the Court. The United States must be aware of and respect this European Union position and work to avoid categorization of its policies as unilateralist, particularly on controversial issues such as the Court. Roy Denman, former representative of the European Commission in Washington, analyzed the disparity in European and American views as follows:

> So the Kyoto Protocol on the environment and the proposal for an International Criminal Court had little appeal. Was American industry in the wide open spaces of the West to be shackled by regulations drafted for overcrowded foreign cities? Were American citizens to be handed over to some anonymous bunch of foreign judges with no concept of American traditions or values? Europeans find it easier to accept involvement in the outside world because for hundreds of years they were ruling parts of it as well as fighting each other.[110]

On 9 July 2002 the EU's Commissioner for External Relations, Chris Patten, delivered a thoughtful critique of the shortcomings of American policy on the Court and the dangers that it posed for the future:

> The United States was fully engaged in the Rome Conference that prepared the ICC. It sought all sorts of assurances, and it got them. For example: The ICC is complementary to national courts…The ICC will not be retrospective…Investigations can proceed only after a pretrial chamber has determined there is a reasonable basis for action…Under Article 16 of the ICC Statute the U.N. Security Council can decide to

110 Roy Denman, "Europeans Should Stop Whining and Pull Their Weight." *International Herald Tribune*, 23 May 2002. Available from "The Tocqueville Connection: The insider's web source for French news and analyses." [http://www.ttc.org/cgi-binloc/getzip.cgi?0+5092]. Accessed 11 December 2002.

> block prosecutions for fixed periods. In short, the United States demanded elaborate safeguards, and it got them. But in a pattern that has become wearily familiar in other contexts such as the Kyoto Climate Change Treaty, it then revoked its intention to sign. This technique carries serious long-term risks. Why should people make concessions to America if the United States is going to walk away in any case? I deeply regret the decision, because I admire the United States and know how its decision will be interpreted. The United States will be accused of putting itself above the law.[111]

Patten's remarks are indicative of the complexity of European Union views of its superpower partner across the Atlantic, and the United States must be sensitive to these opinions in its future policies toward the Court. The European Union has retained its official commitment to the International Criminal Court. Despite previously allowing its members to negotiate with the United States on possible Article 98 agreements on a national basis, the European Union has solidified its support for the Court and its opposition to American entreaties for separate immunity agreements. America's firmness in upholding its policies since May 2002, particularly its recent suspension of military aid to certain countries, may serve to isolate the European Union from the United States and further exacerbate disagreement.

111 "Why Does America Fear This Court?" Commissioner [Chris] Patten on the International Criminal Court: Brussels, 9 July 2002. Available from [http://europa.eu.int/comm/external_relations/human_rights/news/ip02_1023.htm]. Accessed 22 November 2002.

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IV- DIVERGENCE IN U.S. AND EUROPEAN UNION VIEWS: WHAT IS THIS DISPUTE REALLY ABOUT?

The United States and European Union countries have formulated policies toward the International Criminal Court consistent with their respective political, cultural and historical traditions. Despite diverging views of the Court's potential, both sides share strong legal traditions and the agreed goal of bringing perpetrators of terrible crimes such as genocide to justice. Hence, the debate over the International Criminal Court is actually less a dispute about its specific legal aspects and prospects for advancing norms of international justice than it is a political controversy highlighting fundamental differences within the Euro-Atlantic relationship.

One of the most intriguing aspects of the debate over the ICC has been its symbolic importance in transatlantic relations. The essence of the quarrel between the United States and European Union countries has been that the International Criminal Court is an international institution symbolic of broader asymmetry between the two sides, an asymmetry that has become apparent in new ways since the end of the Cold War. The controversy surrounding the Court represents the disparity in power between the United States and Europe, illustrates the paradox of the common ends of international justice both sides seek despite disagreement over the proper means of achieving them, and highlights diversity in European and American strategic and diplomatic cultures. Furthermore, its legal precepts aside, the Court has become a political tool wielded by both parties in their multilateral intercourse and in their relations with post-communist states in Eastern and Central Europe that are seeking to further integrate themselves with the democratic West by joining NATO and the European Union. Indeed, European and American commentators often appear to be "talking past one another" in their remarks concerning the Court and associated issues.

A. POWER DISPARITY

The controversy over the International Criminal Court is indicative of a power disparity between the United States and European Union countries. This disparity tends

to breed resentment and encourages characterizations of American foreign policy as unilateralist and European policies as multilateralist. This section analyzes the power disparity between states on the two sides of the North Atlantic Ocean, evaluates the "paradox of American power" in current affairs, explores the role of American unilateralism in competition with European multilateralism, and examines the relationship between the United Nations Security Council and the ICC as an example of the role of power in trans-Atlantic relations.

It is no secret that, by a host of measures, the United States is militarily more powerful than the European Union countries. This power gap is in itself not surprising, but the means by which this divide has come to influence the policy-making and strategic calculations of Europeans and Americans is intriguing indeed.

The United States views international treaties and institutions from a position of considerable global power, both "hard" and "soft", and as such enjoys a remarkable amount of autonomy in its policy-making with regard to such organizations and commitments. As noted by Christopher Layne of the Cato Institute, "A hegemonic power like the United States today has overwhelming hard power—especially military power—and indeed there is no state or coalition with commensurate power capable of restraining the United States from exercising that power."[112] European Union countries, on the other hand, generally approach multilateral treaties and institutions from a position of weakness relative to the United States. Professor David P. Calleo of Johns Hopkins University has asserted that

> Just as it is unwise to underestimate the vitality of this new Europe, it is wrong to believe it unconcerned with power. On the contrary, thanks to its own tragic history, today's Europe is very much aware of power—above all aware of the terrible temptations and dangers of unbalanced power. Its natural bent is toward building a balanced concert of states to control power. When faced with conflict— internal or external—Europe's instinct is toward conciliation, toward finding common ground. It has grown skillful at focusing soft power to nudge contending parties into agreement.[113]

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112 Christopher Layne, "America as European Hegemon," *The National Interest*, no. 72, Summer 2003, 26-27.

113 David P. Calleo, "Power, Wealth and Wisdom: The United States and Europe after Iraq", *The National Interest*, no. 72, Summer 2003, 15.

This divergence in how the United States and European Union countries perceive the role of military power in international affairs was expressed succinctly by Senator John Kyl (R-Arizona) in August 2002:

> At this point, allow me to step back from specific areas of disagreement with the Europeans to a more general one—the utility of power vs. diplomacy. We all agree that both have their place; but it is probably true that the U.S. will resort to power more often than continental Europeans are disposed to do. A corollary is that Americans probably have less confidence in treaties than do Europeans.[114]

Furthermore, Joseph S. Nye, Jr., Dean of Harvard's Kennedy School of Government, discussed the important role that power of various types will continue to play in the transatlantic relationship:

> Soft power arises from the attractiveness of a country's culture, political ideals, and policies. When U.S. policies appear legitimate in the eyes of others, American soft power is enhanced. Hard power will always remain crucial in a world of nation-states guarding their independence, but soft power will become increasingly important in dealing with the transnational issues that require multilateral cooperation for their solution.[115]

This gap in power contributes to what has been termed the "paradox of American power" in current world affairs.

1. The "Paradox of American Power"

However, this disparity in power and the important role that it plays in the Atlantic Alliance should not mask the fact that the United States faces a dilemma inherent in its current position. The paradox of American power is that even a country as powerful as the United States can rarely act with total autonomy[116]. At its heart, the dispute over the ICC between the United States and Europe reflects this paradox of power and its impact on each side's view of international multilateral institutions.

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114 "The Future of Transatlantic Relations." by the Honorable John Kyl, Heritage Lecture #756, 6 August 2002. Available from [http://www.heritage.org/Research/Europe/hl756.cfm]. Accessed 21 June 2003.

115 Joseph S. Nye, Jr., "U.S. Power and Strategy After Iraq," *Foreign Affairs*, Vol. #82, no. 4 (July/August 2003): 66.

116 Some observers question whether this is truly a paradox, in that having a great deal of power does not logically imply having unlimited or unrestricted power.

Joseph S. Nye, Jr. argues that the current state of world affairs demonstrates this paradox of American power, and that it will have an impact on American foreign policy decision-making in the future: "In the absence of international institutions through which others can feel consulted and involved, the imperial imposition of values may neither attract others nor produce soft power…The paradox of American power is that world politics is changing in a way that makes it impossible for the strongest world power since Rome to achieve some of its most crucial international goals alone."[117] In his recent work *The Paradox of American Power: Why the World's Only Superpower Can't Go It Alone*, Nye expanded on the concept of this paradox in the current state of American power:

> As one sympathetic European correctly observed, "From the law of the seas to the Kyoto Protocol, from the biodiversity convention, from the extraterritorial application of the trade embargo against Cuba or Iran, from the brusk calls for reform of the World Bank and the International Monetary Fund to the International Criminal Court: American unilateralism appears as an omnipresent syndrome pervading world politics."[118]

2. American Unilateralism vs. European Multilateralism

This disparity in power between the United States and the rest of the world has led to characterization of American policy as strongly unilateralist, whereas European governments are more apt to seek multilateral solutions. In his study *Of Paradise and Power: America and Europe in the New World Order*, Robert Kagan discusses common conceptions of both American and European foreign policies. Kagan characterizes American policies in the following manner:

> The problem today, if it is a problem, is that the United States *can* "go it alone," and it is hardly surprising that the American superpower should wish to preserve its ability to do so. Geopolitical logic dictates that Americans have a less compelling interest than Europeans in upholding multilateralism as a universal principle for governing the behavior of nations. Whether unilateral action is a good or a bad thing, Americans

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[117] Joseph S. Nye, Jr., "U.S. Power and Strategy After Iraq," *Foreign Affairs*, Vol. #82, no. 4 (July/August 2003): 67, 72.

[118] Joseph S. Nye, Jr., *The Paradox of American Power: Why the World's Only Superpower Can't Go It Alone* (New York: Oxford University Press, 2002), 155. Nye is quoting Harald Muller, quoted in Franz Nuscheler, "Multilateralism vs. Unilateralism," Development and Peace Foundation, Bonn, 2001, 5.

> objectively have more to lose from outlawing it than any other power in today's unipolar world.[119]

Kagan then described the contrasting nature of European foreign policies by highlighting his view that:

> Europe's relative weakness has understandably produced a powerful European interest in building a world where military strength and hard power matter less than economic and soft power, an international order where international law and international institutions matter more than the power of individual nations, where unilateral action by powerful states is forbidden, where all nations regardless of their strength have equal rights and are equally protected by commonly agreed-upon international rules of behavior.[120]

However, lest one accept Kagan's conclusion that "Americans are from Mars and Europeans are from Venus"[121] as pre-ordained and begin writing the obituary of transatlantic relations, one should consider an insightful response to the Kagan thesis. Christopher J. Makins, President of the Washington, D.C.-based Atlantic Council of the United States, contends that

> Above all, there is a need to tone down the rhetoric of a public debate in which, in recent months, Europeans have accused Americans of being simplistic unilateralists and Americans have accused Europeans of being, at best, irrelevant wimps…The best interests of both sides lie in ensuring that those gaps of policy, and the underlying differences of interest and assessment, are not allowed to mask the greater similarities of interest. For the differences are not as large or as structural or as enduring as Kagan's provocative article would have one believe.[122]

Scholarly debate over the divergence between the United States and Europe highlights the importance of the ICC debate in European-American relations. Stewart Patrick of New York University discusses the irony of American unilateralism:

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119 Robert Kagan, *Of Paradise and Power: America and Europe in the New World Order* (New York: Alfred A. Knopf, 2003), 39 ; italics in original.

120 Ibid., 37.

121 Ibid., 3.

122 Christopher J. Makins, "'Power and Weakness' or Challenge and Response?: Reflections on the Kagan Thesis." Available from [http://www.acus.org/Publications/occassionalpapers/Transatlantic/KaganRiposte.pdf]. Accessed 9 May 2003.

> The United States has never been very comfortable with the constraints and obligations of multilateralism. Indeed, a hallmark of U.S. foreign relations is that the nation has been the world's leading champion of multilateral cooperation and, paradoxically, one of the greatest impediments to such cooperation. No other nation has done so much to create international institutions, yet few have been so ambivalent about multilateralism, so well positioned to obstruct it, or so tempted to act unilaterally. This ambivalence reflects three features of the American experience: the nation's singular political culture, its domestic institutional structure, and its global dominance.[123]

Patrick then describes the American affinity for unilateral behavior under certain circumstances:

> U.S. officials also defend unilateralism in ethical terms, depicting it as a moral imperative transcending secondary international obligations; as the only means to remain true to U.S. identity and values; as a last resort, taken after exhaustive efforts to reach consensus; as a contribution to the general welfare rather than narrow U.S. interests; or as a form of leadership to overcome inertia, mobilize a coalition, create an international standard, or enforce an international agreement…In recent years, U.S. government officials have sometimes justified unilateral American action by invoking the country's willingness to subsidize international security and run disproportionate risks for global stability. In discharging its obligations as the ultimate custodian or guarantor of global order, they argue, the United States cannot afford to be hamstrung by rules and institutions binding on others.[124]

Phillip H. Gordon of the Brookings Institution outlines the foundations of American and European identification with unilateral and multilateral policies, respectively:

> Finally, history, geography, and the power differential have left the two sides of the Atlantic with very different attitudes toward sovereignty—clearly the source of all our recent disputes over "multilateral" issues such as arms control agreements, the United Nations, and the International Criminal Court. A powerful United States with enormous freedom of action throughout the world feels little pressing interest in new mechanisms that might curb that freedom. Europeans, on the other hand,

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123 Stewart Patrick, "Multilateralism and Its Discontents: The Causes and Consequences of U.S. Ambivalence," in Stewart Patrick and Shepard Forman, eds., *Multilateralism and U.S. Foreign Policy: Ambivalent Engagement* (Boulder, Colorado: Lynne Rienner Publishers, 2002), 7.

124 Stewart Patrick, "Beyond coalitions of the willing: Assessing U.S. multilateralism." *Ethics & International Affairs*. Vol. #17, no. 1, New York: 2003. Available from [http://proquest.umi.com/]. Accessed 21 June 2003.

> have spent 50 years gradually, and for some painfully and incompletely, getting used to the idea of living in an "international community" and accepting constraints on their sovereignty. It is not surprising that smaller and weaker countries on a crowded continent are more interested in and find it easier to live with binding international laws and agreements than is the world's sole superpower, which spans a vast continent.[125]

Gordon's insight highlights the deeper issue of sovereignty that is one of the foundations of the apparent divergence between unilateralist American and multilateralist European policies. The United States is powerful and thus capable of defending its sovereignty more effectively than European countries that are generally more interested in pooling their sovereignty in multilateral institutions. To be sure, EU members have pooled sovereignty not primarily for defense purposes, but to advance shared political and economic objectives.

One of the frustrating aspects of this controversy for Europeans has been the fact that the United States is such a strong supporter of multilateral institutions in theory, providing considerable leadership and assistance in their foundation, yet often chooses not to abide by their precepts and instead acts in a unilateral fashion. Patrick discusses why the United States may choose to pursue unilateral policies, albeit often in defense of multilateral goals:

> Multilateral institutions are vulnerable to numerous pathologies, such as free riding, buck passing, glacial decision-making, and lowest common denominator policy-making…Given the shortcomings of multilateral institutions, as well as the gross asymmetries of power in the contemporary international system, robust American unilateral action may be ethically preferable to flaccid multilateralism, even when it violates international norms. At times, unilateralism may actually advance the cause of multilateralism.[126]

Yet perhaps nowhere are the elements of American behavior that Europeans find frustrating better illustrated than in the case of the United Nations Security Council vis-à-vis the ICC.

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[125] Phillip H. Gordon, "Bridging the Atlantic Divide." *Foreign Affairs*, Vol. #82, issue #1 January/ February 2003. Available from [http://proquest.umi.com/]. Accessed 15 June 2003.
[126] Stewart Patrick, "Beyond coalitions of the willing: Assessing U.S. multilateralism." *Ethics & International Affairs*. Vol. #17, no. 1, New York: 2003. Available from [http://proquest.umi.com/]. Accessed 21 June 2003.

3. The United Nations Security Council and Trans-Atlantic Relations

This dispute has also concerned the role of the United Nations Security Council in the preservation of international peace and security. The United States, given its permanent veto power on the Security Council, seeks a Court that is ultimately subordinate to the United Nations Security Council, and many European countries in weaker positions seek an ICC that is entirely independent of the veto power of the permanent United Nations Security Council members, and thus able to avoid what they consider undue coercion by China, France, Russia, the United Kingdom, or the United States. It is ironic that the United States has appealed to the need to uphold the authority of the United Nations Security Council to defend its opposition to the ICC, arguing that the United Nations Security Council and not the International Criminal Court is responsible for the maintenance of international peace and security, yet has been remiss in paying its considerable dues to the organization.[127] Moreover, the United States has chosen on occasion to use force without the explicit authorization of the UN Security Council, notably in the Kosovo crisis in 1999, when the NATO Allies—including ten EU members—conducted an air campaign against the Federal Republic of Yugoslavia.

Thus, the United States government approaches the International Criminal Court from a position of considerable power, as a permanent veto-holding member of the United Nations Security Council and significant financial and military contributor to the organization. The United States, by virtue of its military and diplomatic power, has a unique ability to pursue its objectives via the United Nations when it can gain the support of enough influential like-minded states, yet it also has the requisite hard power to be capable on occasion of acting outside the purview of the organization.

European countries, on the other hand, place more faith in the United Nations as a guarantor of their positions in international affairs and view the ICC as another institution

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127 "U.S. vs. Total Debt to the UN: 2003." [http://www.globalpolicy.org/finance/tables/core/un-us-03.htm]. Accessed 3 September 2003. As of 31 March 2003, the United States owed $532 million of the $1,182 million owed by all UN members that have yet to fulfill their obligations to the UN Regular Budget; this represents 45% of the amounts owed to the UN Regular Budget. The United States owed $701 million of the $1,367 million owed for peacekeeping or 51% of the total owed; and $1,308 million of the $2,773 million in the All Arrears category, or 47% of this category (which includes International Tribunals).

capable of "leveling the playing field" among the nations of the world, including the United States. This controversy thus concerns the United Nations Security Council and other international institutions within the fundamental context of the power relationship between the United States and Europe. Thus, the dispute over the ICC reflects the disparity in power between the United States and European countries, the paradox of American power, and resulting characterizations of the United States as unilateralist and of European countries as multilateralist. Furthermore, this power disparity is best illustrated by the narrowly defined relationship between the ICC and the United Nations Security Council.[128]

B. PARADOX OF MEANS VERSUS ENDS

Another aspect of the divergence in European and American views on the ICC is that both sides agree on the importance of the principles and objectives at stake if not on how best to uphold them in practice. As Joseph Nye notes, "Americans and Europeans share the values of democracy and human rights more thoroughly with each other than with any other region of the world. As Ambassador Robert Blackwill has written, at the deepest level, neither the United States nor Europe threatens the vital or important interests of the other side."[129] Despite these common values, Europeans and American disagree on the appropriate method of furthering them. According to Charles Kupchan, "Americans see the EU's firm commitment to multilateral institutions and the rule of international law as naïve, self-righteous, and a product of its military weakness, while Europeans see America's reliance on the use of force as simplistic, self-serving, and a product of its excessive power."[130]

Despite its early support for the ICC, the United States government generally believes that international justice is best served through reliance on strong national judicial systems, supported as necessary by ad hoc tribunals under United Nations

[128] This relationship is discussed in Chapter II of the thesis.

[129] Joseph S. Nye, Jr., *The Paradox of American Power: Why the World's Only Superpower Can't Go It Alone* (New York: Oxford University Press, 2002), 34-35.

[130] Charles A. Kupchan, *The End of the American Era: U.S. Foreign Policy and the Geopolitics of the Twenty-first Century* (New York: Alfred A. Knopf, 2002), 157.

Security Council auspices, to ensure that appropriate checks and balances exist to guard against any unwarranted trespass on national sovereignty. From the official American perspective, the International Criminal Court is an institution to be feared not for its *intention* to bring the world's worst criminals to justice but for its *potential* for violations of traditional standards and fundamental principles of justice in the process.

European Union governments generally contend that international law and justice can best be upheld by a world court with broad authority from whose jurisdiction no war criminal can escape. From the European perspective, the Court is the embodiment of international law and justice and incorporates mechanisms sufficient to assuage American fears of the Court's potential abuses of power. Americans criticize elements of the Court, such as the ICC's prosecutor, deemed incapable of conforming to standards of the United States government's political checks and balances, while Europeans endorse those very elements, arguing that the Court has safeguards against the assumption of undue prosecutorial authority and that the prosecutor will be an individual of such character that any abuses would be unlikely.[131] It is an ironic and likely frustrating circumstance for those who seek international justice that the United States and European Union governments agree on ends of international justice, the rule of law, and other goals of the ICC, but differ drastically on their preferred means of pursuing them. Andrew Moravcsik of Harvard University has underscored the importance of the means favored by the United States and European Union countries, respectively:

> Europeans and Americans disagree about not only power and threats, but also means. As Robert Kagan and other neoconservatives argue, U.S. military power begets an ideological tendency to use it. In Europe, by contrast, weak militaries coexist with an aversion to war. Influenced by social democratic ideas, the legacy of two world wars, and the EU experience, Europeans prefer to deal with problems through economic integration, foreign aid, and multilateral institutions.[132]

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131 John R. Bolton, "Courting Danger: What's Wrong With the International Criminal Court," *The National Interest* (Winter 1998/99): 65. "In European parliamentary systems, these sorts of political checks are either greatly attenuated or entirely absent, just as with structures such as the Court and Prosecutor created in Rome. They are accountable to no one."

132 Andrew Moravcsik, "Striking a New Transatlantic Bargain," *Foreign Affairs*, Vol. 82, no. 4 (July/August 2003): 76.

Moravcsik then highlights how the divergent views of Americans and Europeans on the preferred means of addressing international challenges co-exist with agreed goals and values on both sides of the Atlantic:

> In spite of these doubts about the Bush administration's policies, however, underlying U.S. and European interests remain strikingly convergent. It is a cliché but nonetheless accurate to assert that the Western relationship rests on shared values: democracy, human rights, open markets, and a measure of social justice. No countries are more likely to agree on basic policy, and to have the power to do something about it.[133]

Thus hope exists for a reconciliation of differences between Americans and Europeans, and exasperation over disagreements among countries with such similar values should be tempered by the knowledge that two continents whose developmental paths are so divergent have in fact disagreed fundamentally about relatively few issues of substance during their association since the late 1940s. Notwithstanding variations in relative power, the United States and European Union countries disagree over the appropriate means of achieving the goals of the ICC due in part to their distinct strategic and diplomatic cultures.

C. DIVERSITY IN STRATEGIC AND DIPLOMATIC CULTURES

The European-American dispute over the Court has also elicited generalizations about each side's strategic and diplomatic cultures. In this instance strategic and diplomatic culture refers to the system of beliefs and traditions by which a country defines its worldview and with which it develops its national and foreign policies. Charles Kupchan refers to cultural differences within the Atlantic Alliance when he asserts: "At root, America and Europe adhere to quite different political cultures. And the cultural distance appears to be widening, not closing, putting the two sides of the Atlantic on diverging social paths."[134] These distinct cultures have shaped the responses

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[133] Andrew Moravcsik, "Striking a New Transatlantic Bargain," *Foreign Affairs*, Vol. 82, no. 4 (July/August 2003): 77.

[134] Charles A. Kupchan, *The End of the American Era: U.S. Foreign Policy and the Geopolitics of the Twenty-first Century* (New York: Alfred A. Knopf, 2002), 157.

of the United States and European Union governments to the Court and the discussions that have followed over its emerging role vis-à-vis the current system of United Nations peacekeeping operations.

1. American Exceptionalism

An important element of American strategic and diplomatic culture that bears on the ICC dispute is the American assumption of exceptionalism. Professor Bertram S. Brown discusses the American perspective:

> For some, the logic of U.S. indispensability justifies U.S. exceptionalism: the idea that the United States should get special treatment and remain free from the legal restraints applied to other states. According to this view it should retain absolute freedom of action, not only for its own sake but also for the sake of the international community, because in many cases only the United States has the power and the will to act when necessary. This idea of exceptionalism has been invoked, directly or indirectly, as a justification for U.S. objections to the ICC statute.[135]

Stewart Patrick has outlined his view of American exceptionalism:

> As international institutions grow and become more active, some Americans perceive U.S. political institutions, domestic law, and constitutional traditions to be besieged by undemocratic and unaccountable organs of global governance. They worry that international rules and bodies will lack domestic standards of transparency, usurp the authority of the people's elected representatives, and open domestic institutions and private enterprises to unwarranted external scrutiny. Defenders of U.S. sovereignty espouse a doctrine of American exceptionalism; taking a rosy view of America's past, they argue that its unique tradition of democracy and equality means that it does not have to be subject to international law.[136]

David J. Bederman, in a summer 2001 article in the *Emory Law Journal*, noted:

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[135] Bertram S. Brown, "Unilateralsim, Multilateralism, and the International Criminal Court," in Stewart Patrick and Shepard Forman, eds., *Multilateralism and U.S. Foreign Policy: Ambivalent Engagement* (Boulder, Colorado: Lynne Rienner Publishers, 2002), 334.

[136] Stewart Patrick, "Beyond coalitions of the willing: Assessing U.S. multilateralism." *Ethics & International Affairs*. Vol. #17, no. 1, New York: 2003. Available from [http://proquest.umi.com/]. Accessed 21 June 2003.

> That leaves the important question of constitutional constraints on U.S. participation in certain forms of international lawmaking institutions. These restrictions reflect the two essential characteristics of American constitutionalism: divided power and grants of individual liberty. American exceptionalism in attitudes towards the incorporation of international law values does embrace a healthy skepticism. After all, this country has had a successful constitutional order for over two centuries, and we should not rush to incorporate newfangled and untested principles. Opponents of internationalism essentially make two broad-gauged attacks on the incorporation of international rules and participation in international institutions: (1) that to do so would compromise some federalism or separation of powers restriction; or (2) that it would violate a fundamental liberty interest of U.S. citizens.[137]

Stewart Patrick has argued that the American culture of exceptionalism functions to harden American policy toward multilateral institutions that are perceived as threatening to the United States, which explains in part the U.S. objections to (a) the powers of the International Criminal Court's prosecutor and (b) the sharply limited authority of the UN Security Council in relation to the ICC:

> On the other hand, exceptionalism also arouses a countervailing determination to preserve the unique values and institutions of the United States from corruption or dilution by foreign contact and a vigilance to defend U.S. national interests, sovereignty, and freedom of action against infringement by global rules and supranational bodies. The United States remains a model for humanity in this view, but it must limit its global responsibilities and safeguard its internal and external freedoms.[138]

D. POLITICAL TOOL WIELDED BY BOTH SIDES

Another phenomenon evident in this dispute has been use of the Court as a political tool. The United States and European Union governments have applied pressure regarding the ICC to aspiring entrants into international organizations. The member states of the European Union have pressured countries aspiring to membership in the Union to support the Court and to refuse to make "Article 98" agreements with the

137 David J. Bederman, "Globalization, international law and United States foreign policy." *Emory Law Journal*, Atlanta: Summer 2001. Available from http://proquest.umi.com/. Accessed 21 June 2003.

138 Stewart Patrick, "Multilateralism and Its Discontents: The Causes and Consequences of U.S. Ambivalence," in Stewart Patrick and Shepard Forman, eds., *Multilateralism and U.S. Foreign Policy: Ambivalent Engagement* (Boulder, Colorado: Lynne Rienner Publishers, 2002), 7-8.

United States. In contrast, the United States has applied pressure to aspiring entrants into NATO to make such agreements. Consequently, many Eastern European countries, interested in gaining entry to both the European Union and NATO, find themselves caught between the persuasive power of the current member states of the European Union and the United States. In August 2002 *The Economist* noted that "Central Europeans…have been caught in the middle of a growing and ill-tempered dispute between the United States and the European Union, with each side issuing veiled threats to penalise any country that fails to do its bidding." [139] Thus, the use of the ICC in negotiations with aspiring members of the European "community" has been linked by some observers to the rhetoric of the current U.S. administration concerning the shift in focus from Western "Old Europe" toward Central and Eastern "New Europe,"[140] particularly in terms of the possible reorganization of U.S. military installations in Europe. Thus, ironically, the ICC has achieved political and symbolic significance that threatens to divert attention from the primary goals of the Court and the difficult legal challenges it faces.

E. "TALKING PAST ONE ANOTHER"

The dispute over implementation of common principles in practice has generated a situation in which the Americans and the Europeans seem to be "talking past one another" as they debate the validity of competing claims, many of which are matters of national perspective and defy thorough evaluation until the Court begins operation and develops its own body of case law. For instance, the United States is asking states party

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139 "The International Criminal Court: Choose your club, America says: Central Europe torn between the EU and the United States," *The Economist*, 24 August 2002, 42. -- This article also discusses the U.S. pressure on would-be NATO members and the EU's efforts to keep potential members from succumbing to American pressures. The EU usually exerts "soft" pressure in the form of its stated support for the ICC and in terms of the perceived benefits of EU membership.

140 "How deep is the rift?" *The Economist*, 15 February 2003, 12. The expression "Old Europe" in contemporary trans-Atlantic discussions was introduced by U.S. Secretary of Defense Donald Rumsfeld in January 2003. According to the BBC news on 23 January 2003: "You're thinking of Europe as Germany and France. I don't," Rumsfeld said. "I think that's old Europe." "Outrage at 'old Europe' remarks" [http://news.bbc.co.uk/1/hi/world/europe/2687403.stm]. Accessed 3 September 2003.

to the Rome Statute to respect its decision to remain outside of the Court's framework,[141] whereas the European Union countries argue that the United States is threatening transatlantic relations and the Court by not supporting it. The American position in this regard was articulated by Assistant Secretary of State for Western Hemisphere Affairs Otto J. Reich in a September 2002 speech:

> We respect the right of other nations to become parties to the treaty, but ask that other countries respect our right not to do so…The United States will continue to be a forceful advocate for the principle that there must be accountability for war crimes, genocide and crimes against humanity. Our policy on the ICC is consistent with other long-standing policies on human rights, the rule of law and the validity of democratic institutions.[142]

This "talking past one another" phenomenon is also apparent in the aforementioned controversy over Article 98 agreements, since the United States holds that such agreements are consistent with the Rome Statute while opponents charge that they are contrary to the Statute and its intent. In a July 2002 speech in Brussels, Chris Patten, then the EU Commissioner for External Relations, captured the essence of the EU perspective with regard to the irony of the U.S. position: "To see the International Criminal Court as an assault on the United States is, frankly, perverse. The court's purpose, rather, is one that the United States wholeheartedly shares: to ensure that genocide and other such crimes against humanity should no longer go unpunished."[143]

Yet perhaps the clearest example of the perplexing ability of the two sides to view the same treaty from totally different viewpoints and make statements that seem "oceans apart" appeared in remarks made at the 12 June 2003 meeting of the United Nations Security Council in New York. In a discussion of the renewal of UNSC resolution 1422 (2002) regarding exemptions from ICC jurisdiction for U.N. peacekeepers, Ambassador

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141 This position, that the United States respects decisions of other states to adhere to the Rome Statute but only asks that other states respect *its* decision to abstain, is a common theme in many expositions of the U.S. position by American officials.

142 Otto J. Reich, Assistant Secretary of State for Western Hemisphere Affairs, "The U.S. and the ICC." 13 September 2002. Available from [http://usinfo.state.gov/topical/rights/law/02091301.htm]. Accessed 22 May 2003.

143 "Why Does America Fear This Court?" Commissioner [Chris] Patten on the International Criminal Court: Brussels, 9 July 2002. Available from [http://europa.eu.int/comm/external_relations/human_rights/news/ip02_1023.htm]. Accessed 22 November 2002.

Adamantios Th. Vassilakis, Permanent Representative of Greece to the U.N., represented the European Union and made the following assertion:

> The European Union reiterates its belief that the concerns expressed by the United States about politically motivated prosecutions are unfounded, since those concerns have been met and sufficient safeguards against such prosecutions have been built into the Statute…Furthermore, the Statute incorporates the principle of complementarity, which places the primary responsibility for investigation and prosecution with domestic jurisdictions. The Court may assume responsibility as a last resort only when a State is unable or unwilling to do so.[144]

Despite such assurances, U.S. Ambassador James Cunningham, Deputy United States Representative to the United Nations, noted that "The ICC is vulnerable at every stage of any proceeding to politicization. The Rome Statute provides no adequate check. Having every confidence in the ICC's correct behaviour, however that is defined, is not in our view a safeguard."[145]

Thus, whatever the text of the Rome Statute may prescribe, and whether the principle of complementarity would in fact ensure that only a gross mishandling of justice in the U.S. domestic legal system would lead to indictment of a U.S. citizen by the ICC, it is the U.S. interpretation of the Court's potential for abuse that matters in the formulation of U.S. policy. Hence, Europeans and other ICC supporters can argue that sufficient safeguards exist within the treaty, or that in reality a nation as powerful as the United States would never need to worry about an "unjust" proceeding being carried out against one of its citizens; but as long as the leaders of the United States perceive that there is a chance, however remote, of a politicized or unfair trial, then tension will remain and disputes such as those over U.N. peacekeeping exemptions, Article 98 agreements, and the ASPA will continue. Given this circumstance, the ICC is not only about international law in its specific codifications but also about the conflict between two competing interpretations of the role of international institutions and power relationships. This is an unfortunate result, indeed, yet one that must be understood by any observer of

144 "United Nations Security Council, Fifty-eighth year, 4772nd meeting- Thursday, 12 June 2003, New York." [http://www.icccnow.org/documents/otherissues/1422/UNSCpv1422debate12June03.pdf]. Accessed 28 July 2003.
145 Ibid.

this disagreement in order to avoid unfair criticism of the United States as a nation that does not uphold the ideals of international justice or of European Union countries as not responsive to the needs of their main transatlantic partner.

F. CONCLUSIONS

The dispute between the United States and European Union countries highlights an intriguing disparity between principles and practice, the use of the Court as a political tool, and the Court's symbolic status in trans-Atlantic relations. The unique strategic and diplomatic cultures of each side, the power disparity between the United States and Europe, and the concept of American exceptionalism in light of European and American historical development have all combined to make the ICC issue highly politicized, symbolic of the deeper differences among Americans and Europeans, and illustrative of the paradox wherein both sides agree on the noble ends of international justice sought yet part ways on the appropriate means of achieving them. The symbolic and politicized nature of this dispute and the disparity between principles and practice have the potential to breed confusion, frustration, and resentment, all of which have important implications for the Court and transatlantic relations.

Given the Court's symbolic importance in current U.S.-European relations, this issue has become yet another source of tension across the Atlantic among allies and economic partners that already have differing conceptions of whether the use of military force in Iraq was justified, appropriate methods to be employed in the global war on terrorism, international peacekeeping operations, the Arab-Israeli conflict, the burden sharing debate, and the proper role of military force in international relations. That the ICC is such a powerful symbol of the current rift in transatlantic relations ensures that it will continue to play an important role in European-American relations, not only because of the yearly controversy over extension of the U.N. peacekeeping exemption but also because of the essential transatlantic issues it represents.

Finally, it should be noted that disputes of this sort are certainly nothing new among members of the Atlantic Alliance. Throughout the Cold War, European allies

disagreed with the United States over a range of specific issues despite their close strategic and diplomatic partnerships. In a similar fashion, the reluctance of the United States to ratify certain international treaties despite significant influence in their drafting, as well as the post-Cold War debates over burden sharing and emerging security and defense roles for the European Union are illustrative of this rift in European-American relations. Nonetheless, the implications of the withdrawal of the U.S. signature to the Rome Statute and the resulting dispute between the United States and European Union countries over the International Criminal Court could affect the future of the Atlantic Alliance.

V- IMPLICATIONS FOR THE FUTURE

The decision by the United States, a traditional advocate of international law and jurisprudence and pioneer in the establishment of war crimes tribunals, not to adhere to the Rome Statute has raised questions about the Court's validity and the future of international law in this domain. Criticisms by America's detractors notwithstanding, the United States withdrew its signature from the Rome Statute on principled grounds. The United States and European Union governments must evaluate various prospects for the future and tailor their policies accordingly if the objectives of the Court are to be achieved and positive transatlantic relations are to be maintained.

This chapter discusses various scenarios for the development of the Court, corresponding implications for the transatlantic relationship, and recommendations for policymakers on both sides of the Atlantic to aid their governments in weathering the storm of allied controversy. The scenarios include diverse prospects for the Court, U.S. policy toward the Court, the role of the ICC as a divisive or unifying influence on member states of the European community, and the linkage of the ICC to other critical issues in transatlantic relations. The thesis also examines a plausible synthesis of these scenarios into a likely outcome for the Court in the context of the European-American relationship.

A. SCENARIOS

1. Scenario #1- ICC Failure

The ICC could be a failure, either for want of American economic, political, and diplomatic leadership or as a result of a disastrous early trial. Since the states party to the Rome Statute appear determined to pursue the establishment of a fully functioning court, the absence of the United States, though costly and likely to complicate the ICC's operations, will probably not doom the ICC. However, a fully constituted Court will face challenges common to past criminal tribunals, including extradition of accused persons to appear before the Court, enforcement of sentences, and the problematic matter of

deterring future crimes. The Court must contend with further criticism and uncertainty during the time that may elapse before its first trial. However, a controversial or poorly managed initial trial could impede the Court's development or precipitate its demise.

The ICC will be competing against the odds in its initial stages, as Princeton University's Gary Bass concedes:

> At a minimum, long-run deterrence of war crimes would require a relatively credible threat of prosecution: that is, a series of successful war crimes tribunals that became so much an expected part of international affairs that no potential mass murderer could confidently say that he would avoid punishment. The world would have to set up tribunals significantly more intimidating than the UN's two current courts for ex-Yugoslavia and Rwanda. The proposed ICC would likely help, but only if it somehow receives political support from the same great powers who have largely neglected the ex-Yugoslavia and Rwanda tribunals for so long.[146]

If the ICC were unsuccessful, some of the concerns and reservations of the United States about the Court would be validated, and European Union states would find themselves under increased diplomatic pressure, at a time when some European nations are already feeling the effects of having opposed the U.S.-led invasion of Iraq in March-April 2003.

2. Scenario #2- ICC Success

Conversely, the Court might be successful, an outcome that may actually be more likely if the states party to the Rome Statute are motivated by American objections to redouble their efforts to ensure the Court's effective functioning. These states would be wise to heed the advice of Professor Bass: "If there is to be, despite American objections, a serious permanent war crimes tribunal—the ICC—then liberal governments will have to make a far stronger commitment to international justice than they have in the 1990s."[147] A successful debut would vindicate ICC supporters, validate the position of the European Union governments party to the Rome Statute, and put pressure on the

[146]Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, New Jersey: Princeton University Press, 2000), 295.
[147]Ibid., 282.

United States to re-examine its reservations. Additionally, this outcome could precipitate re-evaluation of the validity of other U.S. foreign policy initiatives and undermine the legitimacy of American efforts to promote international law via United Nations Security Council-chartered ad hoc war crimes tribunals. If the Court brought some prominent international criminal to justice, the United States might consider a thorough re-examination of its policy vis-à-vis the ICC, possibly choosing to adhere to it in the future. However, the effectiveness of the Court could be impeded by disagreements between the United States and its partners in the European Union. As *The Economist* noted on 29 June 2002: "Kyoto and the international court have, in effect, become the two most powerful witnesses deployed in the anti-Americans' case, especially in Europe: look, the critics are able to say, the United States is in favour of pollution and against justice." [148] The states party to the ICC hold that they must work to ensure continued broad support for the Court, despite opposition from the United States.

A powerful ICC could, however, threaten the legitimacy of the United Nations Security Council.[149] Though supporters of the Court such as the non-governmental organization Human Rights Watch refer to the oversight of the Security Council as a "safeguarding"[150] measure against potential abuses, the Rome Statute may actually delegitimize the United Nations and its Security Council veto system, as John Bolton has observed:

> Under the UN Charter, the Security Council has primary responsibility for the maintenance of international peace and security. The ICC's efforts could easily conflict with the Council's work…In requiring an affirmative Council vote to stop a case, the Statute shifts the balance of authority from the Council to the ICC. Moreover, a veto by a Permanent Member of such a restraining Council resolution leaves the ICC completely unsupervised.[151]

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148 "Present at the Creation: A Survey of America's World Role," *The Economist*, 29 June 2002, 24.

149 The legitimacy of the U.N. Security Council system (particularly the permanent veto power) and the effectiveness of many U.N. programs may be debatable, but hampering the United Nations needlessly would almost certainly have a negative impact around the world.

150 "Finally, the U.N. Security Council can adopt a resolution suspending the ICC from investigating or prosecuting any case." - Human Rights Watch: "Myths and Facts About the International Criminal Court." [http://www.hrw.org/campaigns/icc/facts.htm]. Accessed 22 October 2002.

151 "The United States and the International Criminal Court: John R. Bolton, Under Secretary for Arms Control and International Security: Remarks at the Aspen Institute- Berlin, Germany- September 16, 2002." [http://www.iccnow.org/resourcestools/statements/governments/USBolton_Aspen16Sept02.doc]. Accessed 16 December 2002.

Furthermore, an ICC capable of superseding the authority of the United Nations would negatively affect the world body:

> This attempted marginalization of the Security Council is a fundamental *new* problem created by the ICC that will have a tangible and highly detrimental impact on the conduct of U.S. foreign policy. The Council now risks having the ICC interfere in its ongoing work, with all of the attendant confusion between the appropriate roles of law, politics, and power in settling international disputes.[152]

This result is particularly worrisome given the current involvement of the United Nations in fifteen peacekeeping operations worldwide, with 34,941 military personnel and civilian police serving from eighty-nine countries.[153] Such a challenge to the authority of the United Nations could be detrimental to millions of people around the world who benefit from its institutions and programs.

In addition to threatening the legitimacy and effectiveness of the United Nations, the ICC could undermine current efforts to punish war criminals and prevent the most heinous of international crimes. Establishment of the Court may lull supporters into a false sense of security whereby they assume that the task of bringing the world's worst criminals to justice has been fulfilled by virtue of creating an institution with broadly stated powers. The criminals of tomorrow may be persuaded that they can act with impunity and challenge the Court to bring them to justice; and past criminals may assume that their crimes will go unpunished, since the Court's jurisdiction is not retroactive.[154]

Responsible governments must not become complacent in their fight against crimes of such magnitude, nor allow the Court to overshadow other judicial experiments like the International Criminal Tribunals for the former Yugoslavia and Rwanda. Each of these institutions must be supported and strengthened in the future, and the ICC (particularly if it benefited from revisions in the Rome Statute that would deal with U.S.

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[152]John R. Bolton, "Courting Danger: What's Wrong With the International Criminal Court," *The National Interest* (Winter 1998/99): 68; italics in the original.

[153]Figures current for 31 May 2003: Background Note: 18 June 2003- "United Nations Peacekeeping Operations." [http://www.un.org/peace/bnote010101.pdf]. Accessed 4 August 2003.

[154]"..its jurisdiction begins when the ICC Treaty enters into force.."- Human Rights Watch: "Myths and Facts About the International Criminal Court." [http://www.hrw.org/campaigns/icc/facts.htm]. Accessed 22 October 2002.

reservations) could complement these bodies and those that follow in order to achieve its goals of promoting international justice. Additionally, even a Court successful in punishing international criminals would not wish to allow such success to hamper its efforts in the more daunting task of seeking true deterrence for such crimes. Professor Bass commented on this challenge as follows:

> Had the West managed to summon the political will to stop the slaughters in Rwanda and Bosnia, there would have been no need for these two fragile experiments in international justice. No war crimes, no war crimes tribunals. But having abdicated the responsibility of stopping war crimes, the West has now put its faith in weak international institutions to restore the world community's good name…Legalism will never make up for the lives lost; but legalism is all we have now.[155]

The fundamental debate about effective deterrence for crimes of this magnitude notwithstanding, the Court's supporters must be mindful of its unproven status and not discount national, "grass roots" measures, such as South Africa's Truth and Reconciliation Commission,[156] as a means of achieving justice and preventing future crimes. Only integrated and complementary efforts offer a credible hope of long-term success.

3. Scenario #3- ICC Fadeaway

In a third scenario, the International Criminal Court could fade from the realm of diplomatic discussions among the United States and its European partners, essentially becoming a "non-issue." U.S. influence could induce other states to examine the treaty text more closely, raising the possibility of (a) additional withdrawals if provisions of the Statute are found unsatisfactory, and (b) countries not yet party to the Statute choosing not to adhere to it. However, despite the U.S. absence from the Court and diplomatic pressure from Washington, one-hundred thirty-nine countries have signed the Statute and

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155 Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, New Jersey: Princeton University Press, 2000), 283.

156 John R. Bolton, "Courting Danger: What's Wrong With the International Criminal Court," The National Interest (Winter 1998/99): 68.

of those ninety-one have ratified it.[157] Organizations such as the Coalition for the International Criminal Court, "USA for the ICC," Human Rights Watch, and others continue to promote the Court and generate awareness worldwide.

4. Scenario #4- U.S. Policy Reversal

In a fourth scenario, the United States could reverse policy and sign the 1998 Rome Statute, creating the possibility of Senate consideration for advice and consent. This scenario is conceivable given a change of presidential administration in 2004, or anytime thereafter. Signature of the treaty without ratification would not in itself make the United States a party to the treaty, but would at least imply a general willingness to cooperate with the court, and an end to efforts to obstruct its functioning. While the United States would remain subject to criticism for what some might perceive as a "half measure," it seems likely that signing the Rome Statute, even without ratification, would diffuse at least some of the political tension that surrounds the Court. Even given a change in the executive branch, however, ratification would remain unlikely, given widespread opposition in the Senate, which could probably not be reversed in a single election cycle.

Future U.S. signature to the Rome Statute might also involve a quid pro quo among the United States and its allies, specifically the European members of NATO, whereby America would renew its signature to the Rome Statute in return for increased European support in peacekeeping operations in Iraq or increased European involvement in other key areas of American foreign policy. In order for this scenario to be plausible, the benefit to the United States of allied cooperation on such foreign policy initiatives must outweigh the perceived risks of signing the treaty; for America's allies, the benefit of an American signature to the Rome Statute must exceed the cost of cooperating with the United States or even condoning what some perceive as illegitimate U.S. actions, such as the use of force in Iraq in March-April 2003. The complex diplomatic negotiations necessary for this scenario to take place make it speculative at best.

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157 "CICC: State Signatures and Ratifications Chart." [http://www.iccnow.org/countryinfo/worldsigsandratifications.html]. Accessed 4 August 2003.

5. Scenario #5- ICC as a Divisive Influence in the EU

The ICC could well become a divisive influence among members of the European Union. Despite the European Union's common policies, its decision to allow the negotiation by member countries of separate agreements with the United States—albeit under proscribed circumstances—and the recent statement of a common policy prohibiting negotiation of such Article 98 agreements with the United States could produce divisions among European countries over their degree of support for the Court and complicate defining a unified European position in the matter. The ICC could also cause intra-European tensions to the degree that it led to further retrenchment of European military responsibilities, particularly in the realm of peacekeeping operations critical to the future of the Atlantic Alliance. A critical example of this situation could be the withdrawal of major NATO troop contributors from the International Security Assistance Force (ISAF) mission in Afghanistan. Maintenance of the Anglo-American "special relationship" over European Union solidarity on the ICC could further isolate the United Kingdom from its European partners. Tensions among current and prospective members of the European Union, particularly given competing pressures from the United States and European Union governments and the strongly pro-American views of most new NATO entrants, could threaten prospects for unity within the European Union. This divisive influence could create a circumstance wherein various groups of European Union countries would align under common "issue alliances" of convenience on certain policies and make further EU common positions difficult to negotiate.

6. Scenario #6- ICC as a Unifying Influence in the EU

The Court could be a unifying force for the member states of the European Union as it expands its membership, revises its constitutional framework, and defines common policies. This scenario is likely in light of previous common European Union policies such as those discussed in Chapter III. However, this scenario envisions even stronger

unity among members of the European Union on the Court and united opposition to American efforts to negotiate Article 98 agreements.

The ICC will be housed in The Hague, the Netherlands, and a united European Union capable of claiming a measure of ownership of the Court might increase the EU's prestige worldwide.[158] If the European Union united behind the common goal of promoting human rights and bringing war criminals to justice, it might present a significant counterweight to American efforts to promote justice via ad hoc United Nations Security Council-chartered war crimes tribunals and challenge the United States to negotiate its position with states party to the Rome Statute.

7. Scenario #7- Status Quo Redux

Given the complexity of European-American relations and the wide range of issues associated with the International Criminal Court, the most likely scenario for the future of the ICC vis-à-vis America and Europe may represent a synthesis of the aforementioned outcomes. This scenario features continued American opposition to the Court and diplomatic pressure on aspiring NATO members to reject the ICC in return for U.S. support in their accession campaigns. The United States might consider linking the ICC to other issues in trans-Atlantic relations, such as the command arrangements for troops in post-war Iraq or the military burden-sharing debate, in an attempt to promote wider opposition to the Court and achieve diplomatic leverage where possible. Under this scenario Eastern and Central European countries may continue to negotiate separate immunity agreements with the United States, thus paving the way for possible disagreement among current and prospective members of the European Union over the Court, despite the official policies of the European Union. The United States may contend with diplomatic resistance from partners in the European Union and NATO while memories of the withdrawal of the U.S. signature from the Rome Statute and the annual debate over renewal of exemptions for United Nations peacekeepers are fresh, a situation exacerbated by recent misgivings among European states about American unilateralism in general and the March-April 2003 intervention in Iraq in particular. The

[158] 1998 Rome Statute lists The Hague as the 'seat' of the Court.

ICC's first case, if successful, may vindicate its supporters and may isolate detractors, including the United States, even further. However, an unsuccessful Court could breed discontent among European Union members, vindicate the objections of the United States, and strengthen relations between the United States and the European states that have been willing to conclude Article 98 agreements with Washington.[159]

In this scenario, the United States must prepare for diplomatic disagreements with European allies as well as obstacles to the formation of future multilateral coalitions and perhaps additional difficulties in the functioning of international organizations. The United States might benefit from stronger relations with newer entrants into NATO, including Eastern European and Baltic states. European countries may have to accept U.S. opposition to the Court and the probability of continued debate over immunity for U.N. peacekeepers, and contend with U.S. pressure on prospective NATO entrants to accept U.S. views on ICC-related issues. Additionally, European Union member states may find it fruitful to attempt to use whatever goodwill can be gained from negotiations on separate immunity agreements that satisfy U.S. concerns as leverage against the United States in future multilateral actions.[160] Finally, in this scenario the ICC could be a resounding success if it tried a case against a major international criminal. The Court could also be an unmitigated failure if its first trial was fraught with controversy and accusations of ineptitude. The most likely scenario may represent not extreme eventualities but rather a give-and-take between the United States and the European Union countries.

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159 "Signatories of US Impunity Agreements (so-called Article 98 agreements), Last Updated: August 7, 2003." [http://www.iccnow.org/documents/otherissues/impunityart98/BIASignatories7August03.doc]. Accessed 27 August 2003. Albania, Bosnia-Herzegovina, the Former Yugoslav Republic of Macedonia**,** and Romania are European countries party to the Rome Statute that have also signed bilateral "Article 98 agreements" with the United States.

160 This analysis has postulated outcomes for the United States, the European Union, and the ICC without accounting for the roles played by other states and organizations. This analysis is not attempting to deny the influential role of these other countries, issues, and interests, but only to focus as narrowly as possible on the relationships between the United States and the European Union, themselves complex and multi-faceted.

B. SUMMING UP THE SCENARIOS

Though the Rome Statute has been widely ratified and entered into force in July 2002, it has yet to prove its effectiveness in an actual trial, and the scenarios discussed above must be evaluated from this perspective. The first cases heard by the Court will be decisive in determining its role in the future. A controversial or unsuccessful initial trial could doom the Court, vindicate opponents like the United States, and reduce its political influence. Should the Court fail because of one of the shortcomings identified by the United States, it would likely quell most criticism of the 2002 withdrawal of the U.S. signature and lead to a marginalization of the Court. In this manner the ICC might be relegated to the list of well-intentioned measures promoting international peace and justice that either failed to meet high expectations or suffered from inadequate enforcement. Just as the 1948 United Nations Convention on the Punishment and Prevention of Genocide, though promising in theory, has not prevented horrific atrocities during its existence in Cambodia, Iraq, Rwanda, and the former Yugoslavia because of practical difficulties in enforcement, so too the International Criminal Court may fail to perform effectively when faced with its initial case for reasons distinct from the U.S. abstention. [161]

C. IMPLICATIONS

What, then, are the practical implications of the European-American divergence? The impacts would seem to be relevant in four primary areas: for the ICC itself, the United States, European Union member states, and European countries currently likely to become involved in the dispute between the United States and the European Union. Of particular importance are the implications of American measures since the May 2002 withdrawal of the U.S. signature to the Rome Statue, namely the leading role in the

[161] Samantha Power, *A Problem From Hell: America and the Age of Genocide* (New York: Basic Books, 2002), 62-63. Power analyzes the post-Genocide Convention cases of Cambodia, Iraq, Bosnia, Rwanda, Srebrenica, and Kosovo. Her fundamental argument focuses on the failure of outside (particularly U.S.) interventions. Thus, the 1948 Genocide Convention can be viewed as a well-intentioned treaty that has been difficult, if not impossible, to enforce.

debates about U.N. Security Council Resolutions 1422 (2002) and 1487 (2003) of the U.S. requirement for exemption from ICC jurisdiction, the pursuit of Article 98 agreements, and the passage of the American Servicemembers' Protection Act of 2002. The summer 2003 debate over U.N. Resolution 1487, renewing exemptions from the ICC's jurisdiction for "current or former officials or personnel from a contributing State not a Party to the Rome Statute"[162] for a further twelve month period, generated strong reactions from supporters of the Court, including the Secretary General of the United Nations and the European Union, as highlighted in comments at a Security Council meeting on 12 June 2003, as noted in Chapters II and III of this thesis.

Continued American pressure on countries to sign Article 98 agreements threatens to isolate the United States from its closest allies, particularly in Europe. On 30 June 2003 it was reported that: "The EU Presidency last week welcomed a declaration by the 10 EU accession countries, and other associated states and EFTA countries, in which they affirmed the EU Common Position rejecting the U.S. bilateral immunity deals, and resolved that their national policies would adhere to that position."[163] Furthermore, in a 30 June 2003 letter to U.S. Secretary of State Colin Powell, Human Rights Watch Executive Director Kenneth Roth stated:

> Whatever the administration thinks of the International Criminal Court, its tactics in pursuing these bilateral agreements are unconscionable. Other governments can plainly see that punitive measures are being used primarily against poor and relatively weak states with few options other than to give in to the United States. Signing an agreement will put an ICC state party in breach of its legal obligations and at odds with other important national interests. This raw misuse of U.S. power makes the policy all the more objectionable.[164]

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162 "United Nations Security Council: Resolution 1487 (2003): Adopted by the Security Council at its 4772nd meeting, on 12 June 2003." [http://www.iccnow.org/documents/otherissues/1422/SCRes1487June2003eng.pdf]. Accessed 28 July 2003.

163 "Coalition for the International Criminal Court: 'U.S. Threatens to Cut Military Assistance to Nations Supporting the International Criminal Court: *Law Pressures Non-U.S. Allies to Sign ICC Immunity Pacts*'- New York, 30 June 2003." [http://www.iccnow.org/pressroom/ciccmediastatements/2003/06.30.03ASPAdeadline.doc]. Accessed 1 August 2003.

164 "Human Rights Watch- 30 June 2003." [http://www.iccnow.org/pressroom/membermediastatements/2003/06.30.03-HRW-PowellLetter.doc]. Accessed 1 August 2003.

One of the implications of the American Servicemembers' Protection Act of 2002 became clear in July 2003 when the United States acted upon its decision to deny military assistance to countries that supported the Court and opposed U.S. policy. On 2 July 2003, the day after the United States "suspended military assistance to almost 50 countries," it was reported that "A U.S. official said that if countries had ratified the treaty setting up the international court and had not received a waiver, the ban on military aid would come into effect. But the threat, enshrined in the American Service Members Protection Act of 2002, does not apply to the 19 NATO members and to nine 'major non-NATO allies.'"[165] In his letter Kenneth Roth also asserted that "We are aware of many examples of American diplomats going far beyond the provisions of the American Servicemembers' Protection Act (ASPA) to pressure small countries [to sign Article 98 agreements]…Such demands on the part of the United States weaken support for the rule of law worldwide and respect for human rights. They also deplete increasingly scarce U.S. diplomatic capital and credibility."[166]

The success of the International Criminal Court will ultimately be determined once it begins hearing cases and developing its own body of case law. The U.S. decision not to adhere to the Rome Statute and instead to object strongly to the ICC's high level of autonomy in relation to the U.N. Security Council and other aspects of the ICC may motivate the states party to the Court to increase their efforts to make it an effective institution. The 13 May 2002 "Declaration by the Presidency on behalf of the European Union" addressed the potential consequences of American opposition to the ICC for international law: "While respecting the sovereign rights of the United States, the European Union notes that this unilateral action may have undesirable consequences on multilateral Treaty-making and generally on the rule of law in international relations."[167]

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165 "U.S. stops military aid to nearly 50 nations over court dispute", *International Herald Tribune*, Wednesday, 2 July 2003.

166 "Human Rights Watch- 30 June 2003." [http://www.iccnow.org/pressroom/membermediastatements/2003/06.30.03-HRW-PowellLetter.doc]. Accessed 1 August 2003.

167 "Declaration by the Presidency on behalf of the European Union on the position of the US towards the International Criminal Court: Madrid and Brussels, 13 May 2002." [http://www.iccnow.org/documents/declarationsresolutions/intergovbodies/EUDeclUSunsigning13May02.doc]. Accessed 10 March 2003.

The Court faces the prospect that realization of American fears, including that of the misuse of the power of the independent prosecutor and the ICC's claims of universal jurisdiction, may weaken its legitimacy and vindicate U.S. opposition. The Court may be challenged from the outset by the lack of support from American material and diplomatic resources and the intense diplomatic wrangling over its provisions, particularly within the transatlantic relationship.

The ICC may chart a bold new course in international law as the world's first permanent international court designed for the trial of individuals. However, the Court must prove itself in an international judicial environment that features the International Court of Justice (ICJ), the European Court of Justice (ECJ), and the ad hoc International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), respectively. The states party to the Rome Statute must ensure that the Court has the opportunity to justify its existence and demonstrate its capabilities and positive contributions to international law by 2009, the year in which (according to the Rome Statute) the Court can first be reviewed by its member states. British barrister Geoffrey Robertson provided insight into the Court's early prospects: "That means the ICC will not have American support until the Rome Statute is altered (e.g. by amending Article 16 so as to give permanent Security Council members a veto over prosecutions). That cannot occur until the seven year review conference (in 2009)— the next chance to make the ICC's universal jurisdiction over crimes against humanity truly universal."[168]

Furthermore, the dispute over the Court has implications for the historically intimate U.S.-European relationship. At a time when the United States and certain European countries remain deeply divided about the legal and moral justifications with which the war against Saddam Hussein's regime in Iraq was waged and in an era of increasingly asymmetric national security threats and rising demands for worldwide engagement in humanitarian and peacekeeping missions, the United States and European states can ill afford to remain at odds over the Court. The European Parliament has argued that transatlantic cooperation could have positive results for the Court: "[A] positive development of the transatlantic relations could reinforce the convergence

[168]Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (New York: The New Press, 2000), 392.

between the European Union and USA in the major values and objectives of democracy and the rule of law and should be done in the framework of a strong commitment in favour of a multilateral approach of the problems."[169] Human Rights Watch director Kenneth Roth alluded to the implications of U.S. actions regarding the ICC for the Atlantic Alliance in his 30 June 2003 letter to U.S. Secretary of State Colin Powell:

> U.S. diplomats have tried to blame the European Union's support for the ICC as the cause of pressure many small countries feel in "choosing" between the United States and Europe. It is clear, however, that the pressure is coming from the United States, since the European Union is not threatening punitive measures over the ICC. These pressures are perceived as petty and mean-spirited by the U.S. government's closest allies. Indifference to this resentment is particularly counterproductive at a time when the U.S. is seeking global cooperation in the fight against terrorism.[170]

Furthermore, the controversy over the ICC has implications within the broader context of current dilemmas challenging the historically warm transatlantic relationship. The quarrel over the ICC can be framed within the context of diplomatic disputes involving the proper role of the United Nations Security Council in international affairs, from the intense controversy surrounding the 1999 NATO air war against Kosovo to the debate over the use of force against Iraq in 2002-2003. The ICC is also important in light of contention between Americans and Europeans over international treaties such as the Kyoto Protocols, the Ottawa Landmine Treaty, and the Comprehensive Test Ban Treaty. The ICC dispute comes during a critical developmental period for future roles of humanitarian missions and peacekeeping responsibilities in the Middle East, Southwest Asia, the Balkans, and Africa. Transatlantic divergence on the proper means of seeking justice for egregious international crimes and the appropriate use of military forces in challenging peacekeeping roles threatens the success of these regimes—to the possible detriment of millions—in the future. Finally, the issue of the ICC and its attendant controversy concerning immunity for soldiers and prospects for bringing criminals to

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169 "European Parliament: Common Motion for a Resolution, 19 September 2002." [http://www.iccnow.org/documents/declarationsresolutions/intergovbodies/EP%20Resolution_19Sept02.doc]. Accessed 10 March 2003.

170 "Human Rights Watch- 30 June 2003." [http://www.iccnow.org/pressroom/membermediastatements/2003/06.30.03-HRW-PowellLetter.doc]. Accessed 1 August 2003.

justice threatens allied cohesion within the realm of the global campaign against terrorism.

The Commissioner for External Relations of the European Union, Chris Patten, outlined the following implications of the U.S. position on the ICC: "More immediately, U.S. opposition to the ICC threatens international stability, because it poses practical problems for the renewal of U.N. peacekeeping mandates around the world. The effects are already being felt in Bosnia."[171] Commissioner Patten's remark was made days prior to the 12 July 2002 U.N. Security Council adoption of Resolution 1422(2002),[172] when United States insistence on the exemption from ICC jurisdiction noted previously called into question the continuation of the U.N. mission in the Balkans. Stewart Patrick noted the implications of the unilateralist tendency inherent in American policy toward the Court:

> Finally, perceived unilateralism may undermine American claims of benevolent hegemony, if foreign observers see the United States as pursuing policies without regard for their opinions, bypassing appropriate multilateral regimes, or holding itself above international norms… "The very weight of the Americans carries them toward hegemonism," French foreign minister Hubert Vedrine has observed, "and the idea they have of their mission is unilateralism. And that is unacceptable."[173]

Patrick outlined further implications in a 2003 article in *Ethics & International Affairs*:

> According to the German jurist Nico Krisch, the U.S. government frequently takes the lead in creating and shaping international law for other states, while itself insisting on remaining 'exempt from or even, as far as possible, above' these rules. The implication is that the United States should be able to use international law to discipline others but not be disciplined by it…In the case of the Rome Statute, which does not

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171 "The EU's Human rights & Democratisation Policy: 'Why Does America Fear this Court?", by Chris Patten- Tuesday, 9 July 2002." [http://europa.eu.int/comm/external_relations/human_rights/news/ip02_1023.htm]. Accessed 22 November 2002.

172 "United Nations Security Council: Resolution 1422 (2002): Adopted by the Security Council at its 4572nd meeting, on 12 July 2002." [http://odsddsny.un.org/doc/UNDOC/GEN/N02/477/61/PDF/N0247761.pdf?OpenElement]. Accessed 11 March 2003.

173 Stewart Patrick, "Don't fence me in." *World Policy Journal*, New York: Fall 2001. Available from [http://proquest.umi.com/]. Accessed 21 June 2003.

> permit reservations, and which the United States has not ratified, the Bush administration insisted in June 2002 that the UN Security Council guarantee that Americans participating in peacekeeping missions be granted immunity from ICC prosecution. European diplomats perceived this demand for a privileged status as a blow to the very concept of a universal international legal system.[174]

Charles A. Kupchan of Georgetown University highlighted more ominous impacts that he considers likely for international institutions in the wake of European-American divergence over the International Criminal Court: "This divergence over values as well as interests is likely to deal a serious blow to the effectiveness of international organizations. Most multilateral institutions currently rely on a combination of U.S. leadership and European backstopping to produce consensus and joint action."[175]

D. RECOMMENDATIONS

Given the likely implications of this dispute outlined above, various recommendations are in order for the United States, European Union member states, and other European countries involved with or likely to be affected by this matter. The states party to the Rome Statute are likely to make concerted efforts to counter the absence of American moral and financial support while promoting the ICC and striving to establish its credibility despite American objections and the controversy raised by the withdrawal of the U.S. signature. These states should seek to formulate common positions in this regard and to negotiate the best possible "middle road" of negotiating with the United States about its areas of concern while not fundamentally undermining the Rome Statute.

The United States government should be more cognizant of the current and potential implications of its policy towards the Court and recent actions such as the suspension of military aid and continued pressure to secure bilateral immunity

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[174] Stewart Patrick, "Beyond coalitions of the willing: Assessing U.S. multilateralism." *Ethics & International Affairs*. Vol. #17, no. 1, New York: 2003. Available from [http://proquest.umi.com/]. Accessed 21 June 2003.

[175] Charles A. Kupchan, *The End of the American Era: U.S. Foreign Policy and the Geopolitics of the Twenty-first Century* (New York: Alfred A. Knopf, 2002), 157.

agreements. Thus, the United States and the European Union should avoid excessive pressure on European candidates for EU and NATO membership, instead recognizing the difficult choices many of these countries face.

The member states of the European Union will likely remain united in their common position toward the Court and toward American policies in this regard. These states must realize that they probably cannot change American policies toward the Court or toward those countries that support the ICC. As suggested above, the European Union must also avoid excessive pressure on prospective EU and NATO members.

Finally, the European states most subject to pressures from the United States and the European Union must define their policies toward the ICC based on their respective national interests and then state those policies clearly so as to avoid, to the maximum degree possible, unnecessary misunderstanding or resentment among what are, after all, partners with enduring common interests far beyond those involved in the Rome Statute.

The implications for the Court and the transatlantic relationship addressed above highlight certain potential pitfalls that both sides must avoid. The United States and European Union governments must not allow their dispute over the ICC to obscure the Court's true intent of prosecuting the world's worst criminals. Additionally, the United States should give credit, to the extent that this is justified, to the Statute's incorporated "safeguards" to prevent abuses and to European efforts to alleviate American concerns, while the Europeans must avoid trivializing American reservations. Finally, states party to the Rome Statute must do everything in their power to prevent the U.S.-European dispute from impeding the Court's functions, rather resolving to demonstrate what the Court can accomplish.

The United States must also determine whether European efforts to "alleviate" American concerns represent legitimate attempts to seek compromise on the Court or rather conciliatory language intended to make the Americans "feel better," and therefore serve European interests by trying to appear to be solving the problems identified by the United States.

Therefore, the wisest course of action for the United States is to pursue its goals in international law and justice within the framework of the United Nations Charter, while

closely scrutinizing the development of the Court. The United States should examine the progress of the Court and state this intention publicly, in order to temper the ill-will harbored by many who oppose the withdrawal of the U.S. signature from the Rome Statute. Professor Ruth Wedgwood's 1998 recommendation could still benefit American policy today:

> In fact, allowing the ICC to mature independently while formally remaining outside the treaty structure is one good way for the United States to hedge its bets while maintaining NATO unity and exercising military leadership. The United States can watch the court take shape before deciding whether to join. If the court handles its work in a just and fair manner, free from political bias, only then need Washington consider signing up.[176]

Complementing this cautious and prudent approach, the United States should also consider Henry Kissinger's advice about interim steps toward achieving international justice:

> Until then, the United States should go no further toward a more formal system than one containing the following provisions:
>
> - The U.N. Security Council would create a Human Rights Commission or a special subcommittee to report whenever systematic human rights violations seem to warrant judicial action.
> - When the government under which the alleged crime occurred is not authentically representative, or where the domestic judicial system is incapable of sitting in judgement on the crime, the Security Council would set up an ad hoc international tribunal on the model of those of Yugoslavia or Rwanda.
> - The procedures for these international tribunals as well as the scope of the prosecution should be precisely defined by the Security Council, and the accused should be entitled to the due process safeguards accorded in common law jurisdictions.[177]

This approach would allow the United States to remain actively engaged in this branch of international law, temper criticism of its policies, and provide it with a range of policy options as the Court develops.

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[176] Ruth Wedgwood, "Fiddling in Rome," *Foreign Affairs* (November/ December 1998): 24.

[177] Henry Kissinger, *Does America Need a Foreign Policy?: Toward a Diplomacy for the 21st Century* (New York: Simon & Schuster, 2001), 282.

VI- CONCLUSION

The United States and the states of the European Union[178] have played central roles in the development of concepts, institutions, and practices of international law. The United States has one of the most highly developed legal systems in the world and the European Union the most effective system of supranational law among a group of sovereign states. Each of these entities seeks justice for the perpetrators of the world's most heinous crimes, among them war crimes, genocide and crimes against humanity. Yet the United States and the European Union view the world's latest experiment in international law, the International Criminal Court, quite differently. While the members of the European Union unanimously support the Court, the United States opposes it on the grounds that it could threaten basic American legal and constitutional principles, present unique threats to American sovereignty and to U.S. military and civilian officials, and place undue obstacles in the way of fulfilling America's demanding global commitments. In addition to the legal issues at stake, the European-American controversy over the Court illustrates the role of power in international relations and symbolizes differing attitudes on the two sides of the North Atlantic Ocean.

This concluding chapter examines the major research questions of this thesis and the major arguments as well as the implications and subsequent recommendations for the United States and the European Union. Finally, this chapter ventures independent conclusions and suggests areas for further research.

A. ANSWERS TO RESEARCH QUESTIONS

The primary research question investigated in this thesis was why the policies of the United States and European Union governments have caused such controversy within the transatlantic relationship. The thesis concludes that the policies of the United States and the European Union have clashed because of the U.S. government's May 2002

[178] The member states of the European Union made significant contributions to international law well before its establishment.

decision to withdraw the U.S. signature from the Rome Statute and to renounce all obligations to the ICC, despite strong EU support for the Court.

Secondly, what are the main areas of dispute between the two sides, and what are their foundations in the text of the 1998 Rome Statute? The main areas of dispute stem from U.S. objections to the Court and suspicions about the potential abuse of its powers in relation to the U.N. Charter and American constitutional, governmental, and legal practices. Indeed, the issues central to this dispute include national power, sovereignty, protection of military personnel, United Nations peacekeeping, and national jurisdiction in extradition cases. Of critical concern to the United States are Article 42(1) of the Rome Statute, dealing with the Prosecutor; Article 27(1), concerning official capacity; Article 16, referring to the role of the U.N. Security Council in ICC investigations; and Article 98(2), dealing with surrender agreements. This dispute has also increased in intensity as a result of American pressure for exemptions from ICC jurisdiction for U.S. peacekeepers in Bosnia via U.N. Security Council Resolutions 1422 (2002) and 1487 (2003), U.S. attempts to secure bilateral "Article 98 agreements," and passage of the American Servicemembers' Protection Act of 2002.

Thirdly, what are the merits of each side's arguments about the Rome Statute and about the policies of the other side? This question touches the heart of this transatlantic dispute, as experts and leaders in the United States and European Union countries make competing claims about the projected operation of the Court. As described in Chapter IV, the two sides often appear to be "talking past one another." American experts have criticized elements of the ICC while European experts have argued that the American fears are unjustified, that the Rome Statute contains sufficient safeguards, and that the unique position of the United States makes any projected negative eventualities unlikely.

In addition, how has this controversy affected U.S.-European relations? This controversy has been one in a series of debates between the United States and European Union countries over the efficacy of international multilateral institutions. The dispute over the International Criminal Court has been invested with a tremendous amount of symbolic significance, but both sides should be able to temper any negative consequences of the controversy through concerted efforts to reach diplomatic solutions.

Finally, what are the likely implications of this dispute for the International Criminal Court in the future and for the future of the transatlantic relationship, and what can be done by both sides to alleviate tensions and resolve contentious issues? The implications and recommendations are reviewed below.

B. MAJOR ARGUMENTS OF THE THESIS

This thesis has examined the official policies of the United States and European Union governments and their foundations in national policies and international legal traditions. It initially addressed U.S. perceptions of the Court, analyzing specific American reservations about the Court and stated reasons for the U.S. withdrawal of signatory status on 6 May 2002. U.S. policy toward the Court can be traced to American legal and constitutional traditions. European Union perceptions of the ICC, including strong support for the Court, have their foundations in the emerging tradition of the EU's supranational legal and governmental institutions.

The thesis then evaluated what the differences in views of the Court indicate about the current status of European-American relations. It considered the extent to which these differing interpretations signify divergent European and American views and increase the likelihood of further diplomatic and political disagreements in trans-Atlantic relations. Furthermore, it examined the political and symbolic nature of the dispute over the Court and resulting characterizations of American and European policies as unilateralist and multilateralist, respectively. It then outlined the implications of this disagreement for the future of transatlantic relations and European and American responses to international events and crises. This section discussed the importance of the growing rift between America and Europe in the context of the military intervention in Iraq and continuing peacekeeping commitments in the Balkans and elsewhere, and with regard to future multilateral military and humanitarian interventions.

The thesis also posited various implications for those involved in this dispute. UNSC resolutions 1422 and 1487 represent the results of America's pressure to secure exemptions for its personnel. It is possible that continued American pressure for bilateral

"Article 98 agreements" may further isolate the United States from its allies, and the United States may face diplomatic repercussions for cutting off military aid to certain countries in accordance with the provisions of the ASPA. The untested nature of the ICC makes it vulnerable to criticism before it has developed a body of case law. The realization of American reservations about the Court would call its legitimacy into question, and controversy between the United States and the European Union could threaten the continued efficacy of international institutions and critical humanitarian and peacekeeping efforts.

Finally, certain recommendations were made for all associated with the transatlantic controversy over the ICC. Given that the states party to the Rome Statute support the Court fully, the U.S. government must increase its awareness of the effects of its policy decisions in this regard and give due recognition to EU efforts to reach workable compromises. In supporting the Court the EU must avoid undue pressure on aspiring EU and NATO entrants. Additionally, European states caught between the United States and the European Union in this dispute must define and state their policies independently to mitigate external pressures. The United States should closely scrutinize the operation of the Court, weigh the diplomatic risks of its current policies toward the Court and states party to it, and continue its efforts to promote the alternative of UN Security Council-chartered tribunals. Most importantly, both the United States and the European Union should make every effort to prevent their dispute over the Court from obscuring its true purpose and the critical and continuing search for more effective mechanisms of international law.

C. CONCLUSIONS

Finally, what can one conclude about the probable effect of the ICC controversy on the future of European-American relations? Several conclusions are in order.

First, it is likely that the United States will continue to take whatever measures are necessary to protect its military and civilian personnel from the Court's jurisdiction, and it is thus also unlikely that the United States will reconsider adhering to the Rome Statute

in the foreseeable future. Second, it is likely that continued American actions to defend U.S. interests in this matter will strengthen European Union opposition to American policies.

Given these two outcomes, the effects on other European states seeking membership in NATO and the European Union are unclear. With concerted effort by both the United States and the European Union, an arrangement prominent in American rhetoric—that of countries respecting the U.S. decision *not* to be bound by the Rome Statute just as America respects the wishes of other states to be so bound—may be reached. Thus, with disagreement over the Court but détente in terms of not allowing such divergence to degrade transatlantic relations, perhaps both sides can avoid undue pressure on European candidates for NATO and EU membership while continuing to work together on other critical judicial pursuits. Disagreement over the ICC need not endanger European-American cooperation with respect to the International Criminal Tribunals for the former Yugoslavia and Rwanda or future tribunals chartered by the United Nations Security Council.

Thirdly, it would be wise for both the United States and the European Union to emphasize the importance of studying the other's position on the Court and associated issues. In this manner, the views of each side about the Court and its associated issues can be better understood by the other side. Experts in the United States and European Union countries can begin addressing each other's concerns more substantively, thus increasing the likelihood of alleviating some areas of contention and at a minimum ensuring that controversy over the International Criminal Court will not do permanent damage to trans-Atlantic relations.

Concerning American efforts to secure immunity for U.S. personnel serving as United Nations peacekeepers, it is reasonable to expect that an annual request for exemption from ICC jurisdiction will be made by the United States, and that this request may perpetuate or even exacerbate negative opinions of U.S. policy and continue to be a source of tension in U.S.-EU relations. Given the important roles American forces play in U.N. missions, disagreement over this issue is likely to continue as each side vigorously champions its respective cause.

Furthermore, the continued U.S. attempts to conclude bilateral Article 98 immunity agreements constitute an excellent example of the type of American "stubbornness"—firmness and consistency in the eyes of the U.S. government—in pursuing an independent policy toward the Court that has been inflammatory among America's closest European Union partners. The American Servicemembers' Protection Act of 2002 is another controversial aspect of this dispute. Though it is highly unlikely that extreme measures such as the use of force to repatriate an American citizen detained by the Court would ever be undertaken against a sovereign European state (the Netherlands), it is nonetheless already clear that the United States will act to defend its interests. America's defense of its "national interests" under this law has already cost certain nations U.S. military aid, and this could create resentments among those denied aid. Though the U.S. policy has been criticized by supporters of the ICC, the current administration has expressed consistent opposition to the Court, with the request that other states respect that policy. Despite accusations that the United States has engaged in "strong-arm tactics," it should be noted that the United States has stayed the course in this matter. Substantial American contributions to international justice, including support for ad hoc UN Security Council-chartered tribunals, should not be dismissed.

From the European Union's perspective there is little that can realistically be done to oppose the annual U.S. efforts to obtain exemption for U.S. personnel serving as UN peacekeepers, given the significant role played by the United States in such missions, particularly in the Balkans. Nonetheless, criticism of U.S. policy by the European Union will likely continue, even as the EU accepts the American position and attempts to meet U.S. demands whenever possible. Concerning Article 98 agreements, the shift in EU policy from partial accommodation (allowing members to conclude independent bilateral agreements, though subject to certain restrictions) to open opposition to American efforts to conclude such agreements reflects the important impact of American diplomacy since the May 2002 withdrawal of the U.S. signature to the Rome Statute. The United States should consider this shift in EU policy carefully and evaluate the degree to which continued unilateral actions in this regard may crystallize opposition to the American position among increasing numbers of European states.

Finally, based on the scenarios outlined previously, the governments of the United States and the European Union should consider acting upon the recommendations presented in this thesis. If the governments concerned pay careful attention to the issues surrounding the Court, this dispute need not have long term negative effects on European-American relations.

Uncertainties remain about the future development of the Court, which may provide fruitful areas for further research. Can the United States remain outside the ICC structure and still respect its operation while striving for the achievement of its noble goals by other means? In theory the withdrawal of the American signature from the Rome Statute could be regarded as a declaration of intent not to cooperate with, or even to obstruct, the Court's functioning, even if Americans are not involved, a course of action whose political consequences deserve careful consideration, since they would certainly exacerbate tensions that have been discussed in this thesis.

Alternatively, will one side or the other be induced to change its position? Will the exceptions and exemptions sought by the United States undermine the ICC or strengthen the resolve of the states party to the Rome Statute? To what extent will the ICC be involved in the trial of former Iraqi leaders for their actions since July 2002? Furthermore, what role will the ICC play in prosecuting those accused of committing atrocities as the international campaign against terrorism progresses? Finally, will the ICC survive its first trial or will the trial of a renowned international criminal prove too controversial or unwieldy? These questions will likely be answered in coming years as the ICC carries out its work. In the mean time, both the United States and the European Union must acknowledge their areas of disagreement and redouble their efforts to minimize long term damage to the transatlantic relationship.

The controversy between the United States and the European Union over the International Criminal Court comes at a critical time in the development of this new legal institution and in an era of increasing threats to international security that put the mechanisms of international law at the forefront. The United States and European Union countries view the Court differently, owing in part to their distinct historical development and unique positions in the international arena. Though this controversy has generated

strong feelings on both sides, areas of common transatlantic cooperation and continuing efforts to promote international law via other means bode well for the future of European-American relations and the development of international legal norms and institutions.

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